

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.D.A, et al,

Plaintiffs,

vs.

United States of America,

Defendant.

*

* Docket # 21-cv-469

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*

* United States Courthouse

* Easton Courtroom

* Easton, PA

* July 6, 2022

* 9:38 a.m.

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TRANSCRIPT OF MOTION TO DISMISS HEARING
BEFORE THE HONORABLE EDWARD G. SMITH
UNITED STATES DISTRICT COURT JUDGE

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1 THE CLERK: All rise. Court is now in session. The
2 Honorable Edward G. Smith presiding.

3 THE COURT: You may be seated. Thank you.

4 MR. ST. JOSEPH: Thank you, Your Honor.

5 MR. EDLIN: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MR. ST. JOSEPH: Morning.

8 THE COURT: The court is called to order in the
9 matter of C.D.A., a minor child, Mr. A., his father, E.A.Q.A.,
10 a minor child, Mr. Q., his father, versus the United States of
11 America. This is civil action number 21-469. Present in the
12 courtroom? I don't know which counsel will be actually
13 presenting, but it's Richard Edlin, Nick Norden, Daniel
14 Friedman, Blake Bailus, Anne Reddy and Adam Kirschbaum.

15 On behalf of the United States of America appears
16 Veronica Finkelstein and Anthony Joseph. Good morning to all
17 of you.

18 MR. ST. JOSEPH: Good morning, Your Honor.

19 THE COURT: The court convenes today to hear argument
20 with respect to the motion to dismiss that has been filed by
21 the United States of America. Primarily arguing that these
22 claims are not cognizable under the federal tort claims act and
23 that there is no waiver of sovereign immunity with respect to
24 the -- let me just get it right here. With respect to the
25 crimes against humanity under the ATS persecution and inhumane

1 acts.

2 Also the United States has suggested that because
3 C.D.A. and Mr. A. were separated in the district of New Mexico
4 and I believe crim -- Mr. A. was criminally charged there and
5 E.A.Q.A. and Mr. Q. were separated in the western district of
6 Texas and I believe Mr. Q. was prosecuted there, but I'm sure I
7 will hear more of that. That these case -- the proper venue
8 with respect to this case would be that the cases would be
9 separated and one would be the district of New Mexico and the
10 other the western district of Texas.

11 Attorney Finkelstein, are you prepared to argue on
12 behalf of the government, or Mr. Joseph?

13 MR. ST. JOSEPH: Your Honor, I'd like to divide if we
14 may?

15 THE COURT: Absolutely.

16 MR. ST. JOSEPH: The argument. So I was going to
17 handle the federal court claim portion and the Ms. Finkelstein
18 can handle the alien portion.

19 THE COURT: That would be fine. Thank you.

20 MR. ST. JOSEPH: Perfect, Your Honor. All right.
21 Thank you, Your Honor. Good morning. As stated, my name is
22 Anthony St. Joseph on behalf of the United States. I'm here
23 with Veronica Finkelstein. The United States moves to dismiss
24 the complaint under federal rules of civil procedure 12(b)(1)
25 and 12(b)(6) because as the court stated a moment ago, the

1 United States has not waive sovereign immunity for the claims
2 arising under the circumstances as alleged in the complaint.

3 And then the -- the complaint seeks to bring a tort
4 claims against the United States under both the federal tort
5 claims act and the alien tort statute. So I'm going to
6 address why the federal tort claims act is not an appropriate
7 remedy for the plaintiffs.

8 Before moving any further into the case I want to
9 restate the government's positions that this is not a defense
10 of the policy that was in place back in 2018 by the prior
11 administration. Our understanding is that that policy is not
12 what's at issue in this case. It's not a policy challenge,
13 it's not a systemic challenge. And so once you remove that
14 element then you're left with is this a tort claim that's
15 cognizable under the federal torts claims act. And that, the
16 federal torts claim act provides a limited waiver of sovereign
17 immunity for the United States. And there are several reasons
18 that this case should be dismissed.

19 THE COURT: And would you agree that there are no
20 constitutional claims here? We have no -- no com -- no
21 deliberate indifference. We have no citing to a statute. We
22 have no attempt to proceed under the 14th Amendment. This is a
23 strictly state tort cause of action other than the -- the
24 alien tort statute?

25 MR. ST. JOSEPH: Absolutely, Your Honor.

1 THE COURT: And do you also agree that the choice of
2 law in this particular case, because these are state law claims
3 for Mr. A. would have to be the New Mexico law and for Mr. Q.
4 would have to be Texas law? Or do you believe Pennsylvania law
5 applies in any respect?

6 MR. ST. JOSEPH: No, Your Honor. We believe that --
7 or I should say, yes, Your Honor. We agree that for Mr. Q.
8 it's Texas and Mr. A. it's New Mexico. The sliver of the case
9 that attaches to Pennsylvania would be the claim against the
10 Berks Residential Center.

11 THE COURT: And that's using the flashlight in the
12 eyes and waking them up?

13 MR. ST. JOSEPH: Correct, Your Honor. That -- that's
14 the evening bed checks, which we believe are kind of cutting
15 right to the chase on that one. We believe that case is easily
16 -- or that portion of the case is easily dismissed under -- if
17 it -- if it survives and alien tort claim, which is what we
18 think it falls under, then it's independent contractor
19 doctrine. Because the acts that are alleged are conducted by
20 county employees, not federal employees.

21 THE COURT: Right. All right. Excuse my
22 interruption. You may continue.

23 MR. ST. JOSEPH: No. No, thank you, Your Honor.
24 It's very helpful because -- so briefly list the categories in
25 which the court may dismiss the case, first and the most

1 significant is the discretionary function exception which
2 applies to this case in -- in brief because it is subject to
3 policy now. So there's a two-part test and both parts of the
4 test are satisfied. Therefore, this case should be dismissed
5 on the discretionary function exception.

6 In the al -- in the alternative to the extent that the
7 plaintiffs are arguing that there was no discretion available,
8 the due care exception goes into effect. The due care
9 exception says that when the government is compelled to act in
10 a certain way that that also falls as it not subject to a torte
11 claim.

12 The third would be the private analog. All of the
13 events that give rise to this claim, that give rise to the
14 alleged torte, there is no private analog. It is directly the
15 result of the enforcement of federal immigration law, which
16 only federal authorities can do. State actors can't do it,
17 private actors cannot do it. There is no private analog and
18 therefore there is no exception under the federal tort claims
19 act that allows this case to go forward.

20 I mentioned independent contractor doctrine and then
21 if any of those defenses -- if the court does not believe any
22 of those defenses would apply then the final bastion is under
23 the common law of the states of New Mexico and Texas. And
24 under the common law of both of those the claims, the
25 individual claims must fail and we'll detail those shortly.

1 But the claims as presented are not cognizable under Texas law
2 or New Mexico.

3 THE COURT: One question. Analyzing this particular
4 lawsuit, normally when we have a suit against the United States
5 a -- the federal tort claims act is waived, meaning they can be
6 used a private individual even though we know, the United
7 States is never quite like a private individual. Certain
8 procedural differences, no jury et cetera. But not punitive
9 damages, no interest. But normally it's a driver of a post
10 truck, drives negligently, hits someone, causes injury and the
11 United States stands liable for that.

12 So you can sue the United States for the injury you
13 suffered. The United States was acting through the driver of
14 the truck. Here where I had a little trouble with the analysis
15 and I would appreciate input from both sides, here it sounds
16 like the argument is that the United States' policy of
17 separating the people thereby implemented by those who actually
18 worked for the United States and did it caused the harm. If
19 that's the case, then we're getting into an interesting issue
20 with discretionary function. The person who is doing the
21 separating, do they have any discretion or have they been given
22 direct orders that they must do that?

23 But it's a two-edged sword for both sides because if
24 they have no discretion then you get into the issue that this
25 is strictly an attack on the policy, not on the action of a

1 government official that was negligent. Because if I'm doing
2 my job as a federal employee and I'm doing my job as I'm told
3 to do my job and I'm not negligent in doing it, suddenly it
4 can't be my negligence that leads to liability it must be that
5 the policy is improper. How do you make that distinction
6 between, the actions of the employee of the federal government
7 versus the policy of the United States government?

8 MR. ST. JOSEPH: Your Honor, from the point
9 of view of the United States, that's why the case fails in a
10 nutshell. While I started off saying it's not a case about
11 policy, the complaint isn't about policy, when you actually
12 examine the case, when you examine the complaint and you
13 examine the response to the government's motion. It's really
14 all about the policy. It's essentially an argument that the
15 policy itself is a tort. And that's what's not cognizable
16 under the federal tort claims act.

17 In fact, the federal tort -- the discretionary
18 function exception of the federal torts claims act expressly
19 excludes things that are subject to a policy analysis. Which
20 this case would be and so discretion comes in on multiple
21 levels in this case and then the thing is, if by looking at the
22 individual decisions there is discretion of the individual
23 officers to the extent that each officer has to decide in each
24 case whether or not the person coming across the border at the
25 time was subject to the policy.

1 That discretion does play in, but there's no
2 allegation that that was misapplied. There's no allegation
3 that it was done in any way other than in compliance with a
4 policy that was -- that enunciated.

5 THE COURT: So can the United States order one of its
6 employees to act negligently under state law and thereby be
7 liable for that employee's actions? In other words, if the
8 policy -- if the policy of the United States is deemed, under
9 state law to lead to the employee engaging in negligent acts or
10 even nec -- intentional interfere -- or intentional acts here
11 too, but that can happen? Or is that -- is that the United
12 States having a policy that is not subject to a cartable claim
13 under state law for -- for violating torte.

14 MR. ST. JOSEPH: I don't think -- I think the answer
15 to that question is, is that the end. It's not cognizable
16 under a torte. So if the government has a policy that violates
17 rights that certainly can be brought to court and arguably,
18 apparently for C.D.A., they went to court in -- in Illinois,
19 federal court and were ordered reunited based on a
20 constitutional claim that something had been violated.

21 But even in that decision the court there tried to --
22 to tread a very careful line because the -- the right that
23 would be at issue in this case that would give rise and that,
24 in fact, is part of the response to argument was, that the acts
25 are unconstitutional therefore they're cognizable under torte.

1 In order -- under the Third Circuit, under the Brian
2 decision and -- and the Supreme Court, in order for there to be
3 a violation, of the constitution that would -- would be able to
4 trump the -- excuse me, the in -- the discretionary function
5 exception. I want to keep my -- my thoughts straight,
6 discretionary function exception. It's -- it would have to be
7 known to the agent, so to the officer it would have to be a
8 right that would be recognized and the officer would be aware
9 of.

10 Then when you look at the facts of this case, and the
11 complicated nature of this case, the act of separation would
12 have to be that act. And the act of separation itself cannot
13 qualify as a tort. It is pursuant to federal law. It is
14 authorized by fed -- by statute. There's a criminal statute
15 that allows a criminal prosecution. There are discretionary
16 decisions as to who and when they should be criminally
17 prosecuted. Those statutes have not been challenged.
18 Constitutionally they're valid. And so when you dig down
19 further that's where you run into the tort claims act problem
20 of why this doesn't qualify as a tort.

21 There may be something else out there, maybe another
22 claim, there may have been something violated, but it doesn't
23 qualify as a tort. And -- and I would submit I hadn't really
24 connected the -- so could an order of the Federal government,
25 constitute a tort under state law --.

1 THE COURT: There's -- there's a principle under
2 federal -- under military law that you cannot obey an illegal
3 order. If you obey an illegal order that you know that is
4 illegal you -- you don't have a defense saying I was ordered to
5 do this. Here are these employees who engaged in these acts
6 that are alleged to be negligent. Even though they are not
7 going to --- pointing to specific individuals and obviously the
8 United States is responsible for the actions of its employees.

9 If they were ordered to do something that while maybe
10 not illegal nevertheless, it caused harm to others, can the
11 United States then be found liable under the Federal Tort
12 Claims Act. It's a -- just a -- I -- it's a very difficult
13 question because the unique nature of this action. Where it
14 leans towards the attack on the policy. Because he pleads, or
15 simply if you tell we'll go back to that --- the post office.
16 If the post office instructs the drivers to deliver mail in a
17 certain way, he's to deliver mail in a certain way. And if
18 he's negligent in doing it then the United States is liable.

19 Here if they tell him to do it in a negligent way,
20 but he does exactly as they tell him is that the United States
21 policy then is created the negligent fact -- negligent act.
22 And that's a little rhetorical than something that you can
23 really answer.

24 MR. ST. JOSEPH: Well, I will try my best, Your
25 Honor. Because that is -- that is the, I think you cut right

1 through the long outline. Excuse me, the heart of -- of the
2 question before the court and -- and the argument that the
3 government is making. Again, not to overly stress it, but it's
4 important, we're not defending the policy itself. So we're not
5 saying that the policy was justifiable or correct.

6 THE COURT: Even when you say that, are you
7 nevertheless saying that there is a separation of powers? And
8 we do recognize the -- the responsibilities of the executive,
9 the responsibilities of the legislative branch and the
10 responsibilities of the court. And we have to always be
11 cognizant of the extent to which the courts can step over that
12 line in trying to address what the executive branch is doing
13 when it's exercising its functions.

14 MR. ST. JOSEPH: I am, Your Honor. To the extent
15 that we're talking about a tort claim, so if there were some
16 other claims I might have different orders, we might approach
17 it differently from the government, but because this is a tort
18 claim for money damages that says a specific act by federal
19 agents and officers on the ground committed a tort against
20 specific individual plaintiffs, that's where -- that's where
21 the case falls down.

22 THE COURT: Because I think I may hear from the
23 plaintiff that yes, there's policy and yes that gets addressed
24 through the pol -- political process and it has. But that
25 doesn't undo the harm that individuals might have suffered

1 under the previous policy. So the question then becomes even
2 though the executive branch, through the political process, has
3 altered the policy, does that automatically eliminate any
4 individual claims that people might have who suffered as a
5 result of that prior policy?

6 MR. ST. JOSEPH: The answer to that question, Your
7 Honor, is that in this case it does. Because in this case
8 we're not talking about a recognized right that was violated by
9 the individual officers so to use the military analogy, it
10 wasn't clearly unlawful order at the time. Border agents are
11 charged with arresting people who are undocumented. So the
12 undocumented folks that come over, sometimes that results in
13 separation.

14 THE COURT: That was a great analogy.

15 MR. ST. JOSEPH: Thank you, Your Honor. Okay, I -- I
16 won't continue. If Your Honor thinks it's necessary, I'll go
17 through the legal framework. But based on the -- the teeing up
18 of the case that was done ---

19 THE COURT: Well, first I want to make sure I
20 understood and maybe this comes best from the plaintiffs,
21 exactly what the claim is because as you read the complaint
22 which is very thorough, or the amended complaint, it's very
23 thorough, but -- and this is part of the problem, the reason
24 for these questions. It just doesn't fall within what we
25 normally expect from a federal Tort Claims Act case.

1 We've got the United States being treated as a
2 private individual subject to the laws of the state, the torte
3 laws of the state. Here this really is not anything to do with
4 the torte laws of the state other than trying to find a vehicle
5 to get damages. There's nothing about this seems in -- what
6 you would expect a private individual ever to be sued as, like
7 a -- a private individual would never be sued for what the
8 United States is alleged to have done in this action.

9 The driver of the post truck, he's just like the
10 driver of a vehicle. You can make the analogy, it makes
11 perfect sense, it's exactly what Congress intended. Here is it
12 at all possible that Congress in passing the federal tort
13 claims act intended that an undocumented migrant coming across
14 the border who is separated from their child could then bring a
15 suit under state torte law, and using the federal tort claims
16 act as its vehicle, is that -- is that even plausible, that
17 Congress intended that outcome?

18 MR. ST. JOSEPH: To answer the question, Your Honor,
19 in some circumstances, yes. So if the station where an
20 undocumented migrant is taken was not maintained properly, and
21 there's a slip and fall, that's a case where I think tort
22 claims act does apply. And -- and the individual plaintiff
23 doesn't -- doesn't really make a difference, it would still
24 apply. If -- if to use the analogy, if the DHS driver is
25 driving from one location to the other and drives negligently

1 and causes an accident that causes a physical injury that would
2 be likely compensable. I probably couldn't concede that
3 because I haven't checked that one. But I think that would
4 likely come under federal Tort Claims Act as well. The -- I
5 want to get into the whole issues of are you present, are you
6 not present? Would that qualify? My immigration brain is
7 going off there, so I don't want to overstep my bounds.

8 But I think and generally speaking those are the
9 types of things where -- where a tort claim is cognizable.
10 But in this case, we're not in any of those worlds. We're in a
11 very, very different world where a policy that has been
12 renounced by the current administration that was frankly, was
13 renounced by the past administration, be -- you know, which
14 they were still in office. It went into effect and taking
15 individual components that are clearly legal and in fact,
16 necessary. A child cannot accompany a parent into criminal
17 custody. That doesn't happen. It doesn't happen to citizens;
18 it doesn't happen to non-citizens.

19 That's really what the tort claims about. Those
20 acts when they took place and the only way that a -- this claim
21 goes forward is if you then gloss on the policy and look at it,
22 well, this -- this all happened because of a policy. So at the
23 micro level this case falls apart.

24 THE COURT: Now, this is another question best
25 addressed by the plaintiffs, but this is not a condition of

1 confinement claim under the 14th or 5th Amendment. This is not
2 a constitutional claim addressing conditions of confinement.
3 It's a federal Tort Claims Act case. At what point -- for what
4 reason is that distinction made? Is this -- was the -- were
5 the detainees in custody? Was the United States responsible
6 for their care, custody and control? Did an exercise in that
7 care, custody and control they do -- did something that caused
8 harm even if it's not a constitutional violation, but a torte
9 violation and is that even possible?

10 I know the examples you just gave, but I guess I'm
11 backing it up. At the time of the separation did we have care,
12 custody and control responsibilities with respect to the
13 detainees?

14 MR. ST. JOSEPH: They were definitely in custody. I
15 think -- think the government has recognized that there is at
16 least some recognition of care and control. What's important
17 is that in this case none of that is what's being challenged or
18 -- or attacked.

19 THE COURT: I'm -- I'm com -- coming up with a trick
20 question for you here. So suppose there was a policy that
21 required return to Mexico to await your asylum here in --?

22 MR. ST. JOSEPH: I'm familiar with that.

23 THE COURT: And you -- and we have now care, custody
24 and control of a detainee and we remove them from the United
25 States and remove them to an area that is dangerous and they

1 are assaulted or otherwise harmed. Can the United States be
2 sued under federal Tort Claims Act for having done that?

3 MR. ST. JOSEPH: No, Your Honor.

4 THE COURT: And the reason?

5 MR. ST. JOSEPH: And the reason for that is that also
6 falls under discretionary function and exception. Because
7 that's a policy issue of -- of --

8 THE COURT: Wouldn't we be using the federal Torte
9 Claims Act to try to affect the United States immigration
10 policy?

11 MR. ST. JOSEPH: That -- that would be the end
12 result, yes, would be dictating, if I heard you correctly,
13 you're dictating policy by allowing individual lawsuits for
14 people to challenge each individual immigration --

15 THE COURT: But don't we all often times use the
16 torte system to try to remedy societal problems. We -- we
17 allow car manufacturers to be sued because the car has a
18 defect, thus hoping to reduce defects in cars. We, you know,
19 safety issues, et cetera. Can the federal Torte Claims Act be
20 used by individual immigrants? Can it be used by individual
21 immigrants even though it does affect policy, but it's also to
22 pursue the individual interests?

23 MR. ST. JOSEPH: Our argument would be not if there
24 isn't an all -- already an avenue to to do so. So in this case
25 you'd be creating a -- a new avenue that undercuts the ability

1 to -- of the -- of the executive, as the court had stated
2 earlier to establish a policy. To answer the question in a
3 slightly different manner, the -- this case and -- and I would
4 submit a number of the decisions that have come out of the
5 Ninth Circuit Courts in Arizona essentially put, you know, put
6 it on its head. Put the analysis of federal torte claims act
7 on its head. They say that because of the conclusion that the
8 policy was a bad policy, therefore the government can't escape
9 liability under the Torte Claims Act.

10 Instead of looking at it as we argue the Third
11 Circuit in Bryant said that you need to, when you're analyzing
12 under the discretionary function, which is, was there a clearly
13 established right that the -- that was known and that the
14 officers would have been aware of at the time of the actions
15 that are alleged to be the torte. And in this case the actions
16 are alleged to be a torte of the separation. And so there is
17 no -- there frankly is no basis to think that an officer
18 separating parent and child for the purpose of criminal
19 prosecution was violating a constitutional right.

20 Now, the court will acknowledge, the court -- certain
21 the court in Illinois found that as applied to the plaintiffs
22 in this case it resulted in a violation of --- interestingly or
23 found the integrity, but the court also acknowledges that found
24 the integrity can't be waived as adsorbed initially to prevent
25 to prosecution under immigration law, or criminal law. And

1 hence we're back to the very thorny nature of this particular
2 case.

3 THE COURT: Say it, what you just said about the
4 family integrity?

5 MR. ST. JOSEPH: Okay. I'm going to make sure I say
6 it the same way. So -- so the court in Illinois found that in
7 C.D.A.'s case they needed to be reunited because the policy as
8 applied violated the right to family integrity. The court also
9 in that same decision recognized and stated that it did not
10 guarantee the father's release, Mr. A.'s release and that
11 family integrity can't be used as a sword essentially to block
12 or to -- or to challenge the application of criminal law and
13 immigration law.

14 THE COURT: And where did -- where did the court find
15 the right to family integrity arises from?

16 MR. ST. JOSEPH: It recognized in other decisions
17 which are escaping me at the moment. But it was -- it was a
18 court, it's judicial doctrine that was found and been accepted
19 by various circuit courts, that there is --

20 THE COURT: And we all agree in family integrity, but
21 we also all recognize that it's far from absolute. I mean when
22 we send our military, if we deploy them, they are separated
23 from the children. Every time I sentence somebody to jail, I'm
24 separating them from their children. Mandatory education, you
25 know, now that is on a temporary basis, deployments on a longer

1 basis. Certain jobs require parents to be away from their
2 children for lengths of time. Everybody agrees that to the
3 extent we can keep families together we want to keep families
4 together.

5 MR. ST. JOSEPH: Absolutely, Your Honor.

6 THE COURT: And it shouldn't be a punishment. It
7 certainly shouldn't be a punishment. We're deliberately trying
8 to punish you to discourage from crossing the boarder by
9 separating you from your children. At the same time there may
10 legitimate governmental interests that require that separation.
11 I don't know, that's a policy and it may become a legal issue.

12 MR. ST. JOSEPH: Right. Your Honor, and -- and --
13 and you once again walked me to one of the thornier issues,
14 which is, you know, there are I mean, child trafficking
15 happens. Family trafficking happens and one of the cases, in
16 fact, one of the other cases that's in California, I think it's
17 a California case that the issue, there is an issue because the
18 parent or the adult is not blood related to the child.

19 Now ultimately, they were reunited. I think the AG
20 just looked at it and decided. But that's the kind of issue
21 that -- that confronted at the border and needs to be
22 addressed. That's just one. Another, you know, if -- that --
23 that the court has recognized that the current administration's
24 policy seeks to hold is that separations only occur, or I
25 shouldn't say only occur, but will occur when someone comes

1 back and they have a criminal history that -- that's triggered.
2 So even if you're with your family and you have a criminal
3 history we're going --- we're going to --

4 THE COURT: Now, does that come into play here?
5 First of all, I'm limited with my factual record. That's the
6 problems with the motion to dismiss, I'm limited with my
7 factual record. I'm limited to what -- essentially what's been
8 plead here. But is this a situation where both Mr. A. and Mr.
9 Q. were charged criminally? And were those crimes immigration
10 crimes or other types of crimes?

11 MR. ST. JOSEPH: They were immigration crimes, Your
12 Honor.

13 THE COURT: Okay. And what was the -- the result of
14 the litigation?

15 MR. ST. JOSEPH: Mr. A. was convicted, plead and
16 sentenced to the time served, 15 days' time served. Mr. Q. was
17 originally charged and the US Attorney's office dismissed the
18 charges.

19 THE COURT: Okay. And ultimately, they were then
20 reunited, one after five weeks of separation and one reunited
21 after seven weeks of separation?

22 MR. ST. JOSEPH: Yes, Your Honor. Mr. Q. was roughly
23 five weeks. They stayed in Texas the whole time. Mr. Q. and
24 E.A.Q.A. and C.D.A. and Mr. A. they were separated for slightly
25 longer, closer to seven weeks. And they were reunited and then

1 -- and then were housed in the Berks facility for a few weeks.

2 THE COURT: You said a past tense. Are they still
3 there?

4 MR. ST. JOSEPH: No. No, Your Honor. No one is.

5 THE COURT: Is anyone in Pennsylvania? Does anyone
6 reside in Pennsylvania?

7 MR. ST. JOSEPH: Oh, do they reside in Pennsylvania?

8 THE COURT: Yeah.

9 MR. ST. JOSEPH: My understanding from the claim is
10 they do; they both reside there.

11 MR. EDLIN: They -- they all do.

12 THE COURT: Why were they -- thank you. Why were
13 they not deported?

14 MR. ST. JOSEPH: Well, now I believe they both have
15 asylum claims that are being pursued.

16 THE COURT: Okay.

17 MR. ST. JOSEPH: So -- so once -- not to -- this
18 isn't an immigration case, this is a federal Torte Claims Act
19 case. I'll stick to that. But for the immigration portion,
20 which I'm very familiar with, typically that's what will happen
21 is once the -- the interview takes place and there is a
22 credible fear of determination then you're put into a long
23 queue for an asylum.

24 THE COURT: So both -- it sounds like both the
25 plaintiff and the defense is going to agree that Mr. A., Mr.

1 Q., and their children reside here in the Eastern District of
2 Pennsylvania?

3 MR. ST. JOSEPH: We have no reason to dispute that,
4 Your Honor.

5 THE COURT: Okay. I know. Have I disrupted you
6 enough to make it almost impossible to get back onto your
7 argument?

8 MR. ST. JOSEPH: Well, that may -- in a good way,
9 Your Honor. It actually helped cut to the chase. So I will
10 quickly summarize then, the discretionary function argument
11 which we've already discussed --

12 THE COURT: Well, let me stop you there again.

13 MR. ST. JOSEPH: Okay.

14 THE COURT: I'm going to interrupt you again, I'm
15 sorry.

16 MR. ST. JOSEPH: I will not --

17 THE COURT: So when we analyze this discretionary
18 function to what extent do I have to analyze whether there's a
19 constitutional violation even though none is brought? And
20 you're -- you're standing like, I don't know what you're
21 talking about Judge, you don't have to consider constitutional
22 violation at all. Do I? Do I have to consider the due process
23 clause at all in trying to determine whether there's a
24 discretionary function -- whether the discretionary function
25 exception applies?

1 MR. ST. JOSEPH: Only to the extent that I stated a
2 few minutes ago, that if the court found that the family
3 integrity was of such a -- was of such a right that the
4 officers on the southern border should have been aware of it,
5 otherwise there is no constitutional analysis. It's not a
6 constitutional claim, it's a tort claim. And so whether or
7 not there was a const viol -- constitutional violation, that's
8 a -- that's a different case that would have to be brought
9 under different provisions. It would not come under the
10 federal Torte Claims Act.

11 You don't -- the federal Tortes Claims Act is not
12 designed -- and the waiver of sovereign immunity is not
13 intended to address constitutional violations. It's intended
14 to address slip and falls, medical malpractice, you know, like
15 the VA or at public clinics. You know, failure to maintain the
16 sidewalk next to Independence Hall, negligent FBI agents who
17 were not paying attention when they're following people. Those
18 -- those types of cases.

19 THE COURT: If I were to find that these acts fell --
20 that that the federal government had waived sovereign immunity
21 I would have to find that they expressly waived it and I would
22 have to find that -- I would have to interpret it narrowly,
23 correctly before we can get into the discretionary function
24 exception I would have to find that I was interpreting this
25 waiver narrowly. How do I do that? How do I find -- narrowly

1 interpret sovereign immunity and the exception of immunity nar
2 -- not narrowly interpret sovereign immunity, broadly interpret
3 sovereign immunity.

4 MR. ST. JOSEPH: We -- we'd prefer that.

5 THE COURT: Narrowly interpret the exceptions to it.
6 Are we not expanding beyond any -- any example in the past, are
7 we not expanding the exception to sovereign immunity beyond
8 what it's ever been ex -- expanded before?

9 MR. ST. JOSEPH: I want to make sure I understand.
10 So would deciding in the government's favor expand sovereign
11 immunity?

12 THE COURT: No. No. That would be -- what I'm
13 saying is, we know that sovereign immunity is a very broad
14 principle.

15 MR. ST. JOSEPH: Yes, Your Honor.

16 THE COURT: Powerful. You can't sue the king unless
17 the king agrees to being sued and obviously the federal
18 government is very reluctant to give very broad exceptions to
19 its immunity. However, you could argue the federal tort claims
20 act is pretty broad, but interpreted narrowly, not interpreted
21 broadly because exceptions to sovereign immunity must be
22 interpreted narrowly. So when we interpret the federal Torte
23 Claims Act, we don't try to increase the waiver of the
24 sovereign immunity, we interpret it narrowly to maintain the
25 sovereign immunity, unless it's very express and clear that the

1 federal government intended to waive its sovereign immunity.

2 In this particular case, can you think of any way
3 this is not greatly expanding the exception, the waiver of
4 sovereign immunity? Can you think of any example where a case
5 such as this has been able to proceed under the federal Tort
6 Claims Act?

7 MR. ST. JOSEPH: Other than the identical cases that
8 are filed in other districts, Your Honor, no. No. And in
9 fact, that's -- that's the government's argument. There is the
10 one case from Texas that found in favor of the government
11 essentially stating exactly what Your Honor just said that it's
12 a limited waiver, this is clearly under discretionary function
13 because it's a policy attack and then -- and then dismiss that
14 portion. And then it gets --

15 THE COURT: And recognize that all the courts have --
16 it's -- it's at the motion to dismiss stage. So it does make
17 it difficult. All judges want to rule on a full factual record
18 if they can.

19 MR. ST. JOSEPH: Thank you.

20 THE COURT: It's more -- it's more fair to the
21 plaintiffs. It makes a more clear decision because you've got
22 actual facts, et cetera. So everybody -- judges do not like
23 ruling on motions to dismiss, as being dispositive because you
24 don't like get the opportunity to develop that full factual
25 record.

1 MR. ST. JOSEPH: And that's absolutely understood,
2 Your Honor, and agreed. And it's not -- it's not likely that
3 the government files this motion to dismiss or cites
4 discretionary function exception, in fact, in this case it, you
5 know, it's a particularly difficult, I think, I'll acknowledge
6 difficult for -- for -- for the current administration, the
7 current stance of the Justice Department. Because we are
8 taking a legal stance and drawing a legal line exactly where
9 the court is pushing us which is the problem with this case, as
10 a Torte Act is it -- it broadly -- or it very greatly expands
11 arguably what any certainly, undocumented person could bring a
12 lawsuit against the United States for. But then it's not
13 limited to just undocumented aliens -- or I'm not supposed to
14 say -- undocumented people. It's -- it, you know, it's
15 obviously applicable in any context and if you have a context
16 in which the -- the central tort, the central act that caused
17 the alleged harm is a policy, is a policy that's enunciated
18 from Washington, DC and then enacted, and I keep going back to
19 the individual steps.

20 Part of what makes this case break down is when you
21 look at the individual steps of the separation and of charging
22 someone and of a child going into HHS custody. Those are all
23 well-established, well laid out and not really challengeable on
24 -- on their own. It's only when the policy is laid on top of
25 that and, you know, that -- and statements from certain

1 government officials are -- are put into focus for each
2 individual or applied to each individual that then suddenly it
3 becomes gray. You know, it's -- it's really not gray when
4 looked as a tort claim and -- and what was the act? What was
5 the alleged tort? And -- and discretionary function in
6 particular, you know, was there an element of judgement of
7 choice and when to enforce -- I shouldn't say enforce, how to
8 enforce immigration law at the border is the ultimate element
9 of choice.

10 Every administration -- I've been in my office a long
11 time now, and every administration wrestles with where do you
12 draw the line on who to charge and who not to charge. And --
13 and that's both in the civil context of removal and then
14 decisions of detention and then who gets charged criminally?
15 And -- and should they be charged criminally? And the issues
16 that come into play as to how close someone is at the border
17 when they are detained. And that's just -- we're just talking
18 about the southern border. There's no reason it's limited to
19 the southern border.

20 It could be -- again, unless you -- unless you were
21 focused entirely on the policy. If you're not focused entirely
22 on the policy and you're looking at the act of detention and
23 the act of separation, that can happen at the Philadelphia
24 Airport if someone tries to come in with a child. You know, it
25 could happen anywhere along the northern border. And so at

1 Miami I'm sure it happens frequently, you have people coming in
2 on boats. You also have people coming in on -- on planes. Who
3 -- who are not necessarily don't have authorization. And --
4 and when it's judged in that context, first is the element of
5 choice by the government and then the second is whether, you
6 know, it was -- it -- it -- it -- it was -- this is the kind of
7 judgement that -- that it was designed to shield and whether or
8 not -- the way to determine that I whether or not it is
9 susceptible citing Golbeirt to the policy analysis. And I
10 think our discussion over the last half hour or so has made it
11 plain that it's also affected policy analysis, that this case
12 stems entirely from a policy determination that was made.

13 THE COURT: And wouldn't that mean also that there's
14 really not much of a factual issue in this case, because if you
15 had to anticipate what discovery would entail, it's not that
16 the facts are really disputed, it's that the policy is being
17 challenged or the harm caused by the policy. And determining
18 what that is and whether it's cognizable under the -- under the
19 law because I assume as you read the facts, that's not your big
20 concern. You're not concerned about what happened. What
21 happened, happened. So discovery wouldn't be that difficult,
22 perhaps on damages. But even there I think most of that's just
23 emotional distress and that type of damages. So it's not a
24 factual issue. Discovery would be -- I don't think discovery
25 would turn up anything other than creative. It can also be

1 stipulated to facts without the need for depositions, et
2 cetera.

3 MR. ST. JOSEPH: Your Honor, I don't know that
4 plaintiffs' counsel agrees with that.

5 THE COURT: All right. Anything else on the federal
6 Torte Claims Act claims, which as I understand we've got
7 intention infliction of emotional distress, negligent
8 infliction of emotional distress, negligence, abuse of process
9 and loss of consortium are the five counts under the federal
10 Torte Claims Act. And those would be based on the laws of New
11 Mexico and Texas.

12 MR. ST. JOSEPH: Yes, Your Honor. So I want --

13 THE COURT: Because I do have another question I
14 thought was kind of interesting, comparative negligence. Now,
15 of course, I'm not an expert on the comparative negligence
16 statutes of Texas or New Mexico, but here in Pennsylvania, if
17 the plaintiff is more than 50 percent liable, they can't
18 recover at all. Is there comparative negligence issue here
19 when you're trying to bring this under the federal Torte Claims
20 Act where, obviously, Pennsylvania law, if we're in
21 Pennsylvania we'd have our comparative negligence statute come
22 into play. And would there be -- and then we don't get a jury,
23 but let's assume there was a jury, would the fact finder have
24 to determine the negligence of the immigrant and is it
25 negligent to cross a border illegally without any real --

1 without knowing that you're likely to come in to contact with
2 border control and that you might end up being separated from
3 your children or other harm may befall you just by doing that,
4 bringing your child across the border almost perhaps blindly. I
5 don't know, maybe they had people waiting for them, et cetera.

6 Does comparative negligence come into play?

7 MR. ST. JOSEPH: I will decline to answer that
8 question for a moment, Your Honor, until we have to at a later
9 date. Because we definitely want --

10 THE COURT: That was a rhetorical one too.

11 MR. ST. JOSEPH: I'm going to step aside. So I
12 appreciate that. I will quickly, and I'll sum up my portion
13 and then turn it over to Ms. Finkelstein. Because I will go
14 then to the -- to the individual claims under state law. So if
15 -- if the case, you know, just in summary again, there's no
16 private analog that, I think, doesn't take much argument. You
17 know, as we discussed it's just not something -- credible
18 criminal statutes and federal immigration statutes are only
19 enforced by federal authorities and the alleged tort here was
20 exactly that, was the enforcement of -- it was statutes we --
21 we discussed discretionary function at great length.
22 Independent contractor doctrine would preclude the claims
23 against the Berks County Residential Center. So that's one
24 portion. And then just going through quickly, the intentional
25 infliction of emotional distress. So if the court were to

1 decide it did have jurisdiction on all of those bases or
2 despite those bases, then the government submits that the case
3 should still be dismissed under the tort law of both New
4 Mexico and Texas.

5 And just reviewing those quickly, and it's all in the
6 briefing so I will do it very quickly, both Texas and New
7 Mexico have adopted the restatement of torts, the second
8 edition. And that requires conduct that's so outrageous or so
9 extreme -- extreme excuse me, to go beyond all boundaries of
10 decency and utterly intolerable for intentional infliction.

11 Texas courts in particular -- and we would argue that
12 -- that the -- that the act of separation because it's
13 authorized by federal law would not meet that definition.
14 Texas courts, in particular have recognized a strong pol --
15 public policy in favor of protecting prosecution and
16 prosecutors and where someone is eligible to be prosecuted
17 allowing that discretion to go forward. So that would not fall
18 under intentional infliction of emotional distress. And that
19 applies to Mr. Q., who ultimately has the prosecution
20 dismissed, but that almost -- point -- proves the point, which
21 is he was referred for prosecution appropriately under federal
22 immigration law. It was taken by the US Attorney's Office and
23 the Western District of Texas. The Western District of Texas
24 then decided to dismiss the case.

25 Second -- and so that whole process is protected

1 under Texas tort law. Negligent infliction of emotional
2 distress, Texas generally doesn't even recognize the claim for
3 intentional infliction of emotional distress under Garza. It
4 was recognized in Garza the Southern District of Texas, 195
5 case.

6 They don't -- Texas further don't recognize that
7 immigration officers have any special duty to do -- to
8 detainees under Texas law. So the negligent infliction of
9 emotional distress claim of Mr. Q. should fail if it survives
10 the other threshold arguments.

11 New Mexico's tort of negligent infliction of
12 emotional distress, is very narrow. It applies only to
13 bystanders who suffer emotional shock as resulting of a sudden
14 traumatic event that -- and this is the key part, so even if
15 you argue that a separation is a traumatic event it needs to
16 cause such -- injury or death to a family member. And there's
17 no allegation that either occurred in this case at the moment
18 of -- of separation.

19 THE COURT: Or the nurse drops the newborn baby right
20 in front of the mother?

21 MR. ST. JOSEPH: In front of the mom. Exactly, Your
22 Honor. That -- that would be -- that would be a negligent
23 infliction of emotional distress. As to the general claims of
24 negligence the federal go -- government generally doesn't have
25 a duty to not enforce federal law. And therefore, there's no

1 breach simply by an -- by enforcing both the immigration and
2 the criminal statutes. There's also an additional deficiency
3 under Texas and Mex -- New Mexico law. Both states require
4 that the plaintiff needs to show a physical injury to manif --
5 physical manifestation under an ordinary negligence claim.
6 And there's no allegation here that there was a physical
7 manifestation of the injury -- of the alleged tort.

8 The abuse of process claim, that's characterized by
9 misuse of power as -- with a malicious motive that results in
10 damages. In this case that -- the -- the alleged damages would
11 be the -- that the government was alleged to have pressured
12 both plaintiffs into relinquishing their asylum rights. And
13 that -- well, putting aside the question -- assuming that that
14 -- that did happen just for the purpose of this motion, they
15 did not relinquish their asylum rights and there's no
16 allegation, no evidence, no indication that that their asylum
17 claim was in any way impacted by that alleged -- by that
18 alleged effort by the government and -- and therefore an abuse
19 of process claim does not -- does not survive.

20 And finally, the loss consortium claim, again, this
21 only arises under both jurisdictions New Mexico and Texas, they
22 have a pretty high standard for that. That also requires
23 either death or serious bodily injury for those claims to go
24 forward and neither has been alleged in this claim.

25 So are there any other questions about the federal

1 Tortes Claims Act?

2 THE COURT: I think I've --

3 MR. ST. JOSEPH: Thank you.

4 THE COURT: -- asked everything I wanted to ask.

5 MR. ST. JOSEPH: Thank you.

6 THE COURT: Thank you, sir. Attorney Finkelstein?

7 MS. FINKELSTEIN: Your Honor, I'll try to keep it
8 more simple, if I can and address the --

9 THE COURT: Well, Attorney Joseph wanted to keep it
10 simple. I'm the one that made it complex.

11 MS. FINKELSTEIN: His best laid plans, Your Honor. So
12 I'll begin by addressing the Alien Torte Claim Statute and then
13 I will move on to the severance and transfer.

14 THE COURT: Let me ask you one quick question. Has
15 the United States of America ever waived sovereign immunity
16 with respect to the Alien Torte Statute?

17 MS. FINKELSTEIN: I was not able to find a case in
18 which the United States permitted a claim like this to go
19 forward. And every circuit court to address it that I was able
20 to locate has sound that there's not waiver of sovereign
21 immunity.

22 The Alien Torte Claim Statute does not create new
23 law, as Your Honor's aware. It doesn't create a common law
24 claim. It is not separately a waiver of sovereign immunity.
25 It is a vehicle, if a claim exists by which certain claims may

1 be heard --

2 THE COURT: If they were going to waive sovereign
3 immunity, Congress would have put it right in the alien tort
4 statute; correct?

5 MS. FINKELSTEIN: Absolutely, Your Honor. And I
6 think Your Honor made a very prescient point when it came to
7 the federal Torte Claims Act, that it's a very specific waiver
8 of sovereign immunity under specific circumstances with a whole
9 series of caveats. It's only for the United States standing in
10 the shoes of an individual federal employee or deemed employee
11 for the things that that employee or deemed employee does, not
12 a corporate negligence, not a broad level claim. There's all
13 kinds of limitations. There's no intentional tortes unless you
14 fall under the intentional tort exception for law enforcement
15 officers. All kinds of nuances.

16 You can't have a claim for loss of mail. All kinds
17 of very specific thoughts by Congress about when the United
18 States as a sovereign, as the government should be haled into
19 court. And there is no indication in the federal Torte Claims
20 Act that these sorts of international law claims should give
21 rise to a tort claim against the United States and that Alien
22 Torte Claim Statute itself doesn't count as such a waiver.

23 So unless the plaintiffs' can point to a specific
24 waiver of sovereign immunity that is particularized to the
25 types of claims that they're bringing here that would allow

1 them to proceed under the Alien Torte Claim Statute then the
2 analysis is quite simple on the Alien Torte Claim Statute.
3 There's simply no waiver. But even if Your Honor was to look
4 at the substance of the claim, and without minimizing the fact
5 that individuals who are victims of torte and other violations
6 clearly suffer, the Alien Torte Claim Statute -- ordinary torte
7 or ordinary constitutional claims or all sorts of different
8 claims.

9 It's a vehicle for very particular type of claim.
10 Violations of treaties that the United States has obligated
11 itself to follow. And violations of the law of nations. And
12 when I say violations of the law of nations, that is not just
13 any -- any old violation that you claim constitutes a crime
14 against humanity or that you label a particular set of actions
15 as torture. We're talking about specific international norms
16 that have widespread state practice and opinio juris, a sense of
17 obligation. Countries are doing it because they feel it is a
18 moral obligation.

19 And the specific acts that we're talking about here
20 do not rise to the level of either of these two. What happened
21 in this case is that two pairs of fathers and sons were
22 apprehended. The fathers and sons were separated for criminal
23 prosecution, under immigration law. That necessitated a
24 separation of the fathers and sons for a period of time, after
25 which they were reunited for a period, one of the pairs of

1 fathers and sons was housed in detention together and then all
2 four of them were released into the United States.

3 That set of facts, those specific facts do not
4 violate any treaty that the plaintiffs can point to. Those
5 specific facts -- those specific chain of events that have pled
6 in the complaint, in the amended complaint in which the
7 plaintiffs must rely upon for their claims do not violate the
8 law of nations. And simply characterizing them as torture or
9 characterizing them as a crime against humanity is not
10 sufficient. That's not the test. The question is this fact
11 pattern -- is this fact pattern a violation of a treaty or a
12 law of nations and it's simply not.

13 And if there's any question in Your Honor's mind as
14 to what kind of claims we're talking about that rise to that
15 level, not just any violation of international law, not just a
16 violation of international corporate law between companies, but
17 the highest form of international law, just look at the cases
18 where the alien tort claim statute has been applied. We're
19 talking about brutal, intentional murders. People being
20 physically harmed in front of their family members. We're
21 talking about beatings. We're talking about political
22 persecution on a very extreme degree. None of those cases
23 comes anywhere near the level of an enforcement of federal law
24 that resulted in a separation for a period of time of some
25 parents from their children.

1 And that's not to minimize what happened. It's to
2 point out to Your Honor that the alien tort claim statute is a
3 very high bar. And that the facts as pled in the amended
4 complaint do not meet it an additional amendment would be
5 futile. It would not resolve the last of waiver of sovereign
6 immunity and it would not -- no amount of additional pleading,
7 no more pages of a second amended complaint, no additional
8 detail about whether it was cold in some of the detention
9 facilities or whether lights were shined during bed checks, no
10 additional pleading would re -- raise this to the level of an
11 alien tort claim statute violation.

12 And so the government believes that that's a very
13 easy claim or easy set of claims for the court to resolve. I'm
14 happy to answer any questions that you have.

15 THE COURT: Well, I appreciate you using the term not
16 to minimize it. It is serious, whenever that -- a child is
17 taken from a parent against that parent's will. That -- that
18 is very serious. But I think of what's going on in Ukraine
19 right now and the -- the issues, when we talk about torture and
20 there are times that children are separated from the parents
21 and sometimes by the government, by force. That was not what
22 the -- this set of facts, I have to agree with you, was not
23 what the alien tort statute was intended to address, but then
24 the question becomes if you just read the language, if you just
25 read the language and not try to make law because we don't make

1 law here. Does it -- does this arguably fall within the
2 language of the statute? That -- because that's the cite at
3 first you got to get around, is the waiver of sovereign
4 immunity. If the federal government has not agreed to being
5 sued under the alien tort statute the -- it's over, you can't
6 sue the federal government unless it's agreed, the United
7 States of America, unless it's agreed to be sued.

8 And I don't know where I find that waiver. that's
9 why I can't wait to hear from the plaintiffs, where do I find
10 that waiver of sovereign immunity? Then even if you get passed
11 that, then it becomes starting more of an interpretation of the
12 statute the language in the statute. Can it possibly -- these
13 facts possibly fall under that? I think everyone here who has
14 children would say if someone is trying to forcibly remove my
15 child from me there's not much more that would get me to
16 commit, you know, a heinous act against them than something
17 like that. At the same time it does happen all the time.

18 It's -- it's just a reality for so many of us who
19 have to travel, who have to, you know, do -- do certain jobs as
20 you're separated from your children for periods of time or
21 periods of a day or whatever it might be. All right. Anything
22 else?

23 MS. FINKELSTEIN: That's --

24 THE COURT: Now, were you going to just -- was
25 anybody going to address the venue issue?

1 MS. FINKELSTEIN: I -- I was if Your Honor was --

2 THE COURT: Absolutely.

3 MS. FINKELSTEIN: -- was done with the alien torte
4 claim statute. If you have no further questions on the alien
5 tort claims statute, Your Honor.

6 THE COURT: Well, before -- no, but before you
7 address venue it almost sounds like you don't want me to be
8 your judge. And you never want to suggest that. But --

9 MS. FINKELSTEIN: Your Honor, I would never suggest
10 that. That being said, we do think that there are proven
11 reasons why severance is appropriate in this case and why once
12 severance occurs, transfer of the cases is appropriate with, of
13 course, deference to Your Honor and -- and the wisdom of the --

14 THE COURT: Thank you.

15 MS. FINKELSTEIN: And the excellent jurist in general
16 on the Eastern District of Pennsylvania.

17 THE COURT: Well, thank you.

18 MS. FINKELSTEIN: That being said sometimes the
19 appropriate thing is severance and transfer and that's what the
20 government thinks is appropriate here. So I want to start by
21 addressing severance. The first issue that the court should
22 recognize is that there is essentially no commonality factually
23 between the two sets of plaintiffs. They're from different
24 countries, they entered at different ports of entry. They did
25 not apparently, at least from the amended complaint there's no

1 allegation that they ever interacted once with the same person
2 who represented the federal government at any time during any
3 of the events that are alleged to give rise to the torte. And
4 not only is there no commonality between the two of them, but
5 one set of father and son, nothing in the amended complaint has
6 anything to do with this district when it comes to those two
7 plaintiffs. They only entered this district after every event
8 that can be pointed to and alleged to be a torte was already
9 done. And we're, you know, of course, crediting the
10 allegations in the amended complaint that they reside in this
11 district. And if that's true, Mr. Q. and E.A.Q.A., his son
12 have no factual connection in terms of the alleged tortes when
13 it comes to Pennsylvania. They were not housed in Berks. They
14 were never detained in Pennsylvania. They never came here as
15 part of the immigration process, visa via the allegations in
16 the complaint.

17 The Eastern District of Pennsylvania has nothing to
18 do with that except that they alleged that they now reside
19 here. And remember, Your Honor, this is an FTCA claim. That's
20 how the plaintiffs chose to plead it. So allowing that set of
21 plaintiffs to litigate here would essentially, and especially
22 allowing them to litigate together with another set of
23 plaintiffs that have no factual commonality would essentially
24 be sanctioning somebody who slips and falls in Texas and
25 somebody who slips and falls in New Mexico, coming here

1 together, joining their claims --

2 THE COURT: It makes it look like it's an attack on
3 the policy.

4 MS. FINKELSTEIN: I can't disagree, Your Honor. And
5 this is -- and the federal torte claims act claim is not the
6 avenue for a broad challenging against the federal policy. And
7 that's the real problem that the United States has with the way
8 that this case has been teed up. It's styled as an FTCA claim,
9 but it's brought like it's a broad challenge to policy. And
10 the fact that you have two sets of fathers and sons who have no
11 factual commonality, no similarity in terms of what they're
12 alleging happened to them and yet they're suing together in
13 this district because they now reside here sure does make it
14 feel like this is not an FTCA claim, but rather it is a broad
15 attack on the policy.

16 So there's -- there's simply no commonality and I
17 would also point out to Your Honor that the only factual hook
18 for this district is the fact that the other set of plaintiffs,
19 Mr. A. and C.D.A. were for a period of time housed together in
20 the Berks residential facility. Mr. St. Joseph has already
21 addressed the FTCA arguments. I think -- I personally think
22 that one of the government's strongest arguments is the
23 independent contractor exception to the FTCA and that would
24 apply to all of the actions that happened at the Berks
25 residential facility. And if Your Honor were to agree and if

1 Your Honor were to, you know, dismiss claims relating to Berks
2 now there's no hook for either plaintiff when it comes to the
3 Eastern District of Pennsylvania.

4 So as it stands you have two sets of plaintiffs
5 together in one case. One set has no connection to the
6 district. The other has a very tenuous connection. Really
7 what the challenge here arises from is the separation. And
8 there's no dispute that that separation did not occur in the
9 Eastern District of Pennsylvania. That happened elsewhere in
10 other states that also have federal courts that have an
11 interest in litigating these cases.

12 So we believe the argument for severance is very
13 clear. And that there is no legitimate reason why these two
14 sets of plaintiffs need to continue to litigate together or
15 need to continue to litigate here. And once they're separated,
16 the cases become much more straightforward. Probably the best
17 example I could point to of why severance and transfer is -- is
18 appropriate here is the many pages of pleading between the
19 government and counsel for the plaintiffs just trying to
20 understand and argue what choice of law applies.

21 It appears that we're both in agreement that
22 different choice of law is going to apply to the different sets
23 of plaintiffs even though the government and plaintiff's
24 counsel disagree about some of what choice of law would apply,
25 but we're all in agreement that Mr. Q. and E.A.Q.A., they're

1 subject to Texas law and Mr. A. and C.D.A. are subject to other
2 law. The parties disagree about what law applies to Mr. A. and
3 C.D.A., but it's not Texas law.

4 THE COURT: I was going to ask if the separation took
5 place in New Mexico, but the problems at the facility took
6 place in -- in Pennsylvania.

7 MS. FINKELSTEIN: There are some allegations in the
8 complaint about the night check policy at Berks. I would say
9 that a majority of the allegations in the complaint even about
10 Mr. A. and C.D.A. have to do with actions that occurred outside
11 of the district. The only real challenge that has to do with
12 the Eastern District is that very limited period of time when
13 they are housed together in Berks.

14 THE COURT: Which you believe the independent
15 contractor exception?

16 MS. FINKELSTEIN: Yes.

17 THE COURT: Address?

18 MS. FINKELSTEIN: Yes, Your Honor. But you know, the
19 government's point of view and the government's argument is
20 that the choice of law analysis makes clear that there's no
21 reason for these claims to be together. There's really no
22 commonality. The only apparent commonality is that they both
23 are sets of individuals who crossed the border during the
24 former presidency. They both were subject to the policy and
25 they are unhappy with the application of the policy to them and

1 they have the same counsel. If that was sufficient to get
2 jurisdiction for multiple plaintiffs in the Eastern District of
3 Pennsylvania, Your Honor, then frankly everybody, all across
4 the country who wanted to challenge anything under the federal
5 tort claims act, any car accidents, any slip and fall, any med
6 mal would just hire the same counsel and find themselves before
7 Your Honor.

8 And -- and so there are important reasons why it
9 makes sense to sever and transfer. The Jumara factors, both
10 parties agree are the analysis. I don't think there's any
11 disagreement between the counsel from both sides that then you
12 would be proper in the Western District of Texas and in the
13 District of New Mexico. So there's no dispute that there is
14 another court where venue would be proper. The only real
15 dispute between the government and counsel for the plaintiffs
16 is whether or not the cases should be severed and transferred.
17 And Your Honor, the government respectfully argues that the
18 Jumara factors are quite clear and they weigh in favor of
19 severance and transfer.

20 The only really Jumara factor that the plaintiffs can
21 point to is their preference. But the plaintiffs' preference
22 of forum, while it's given some weight, it's not dispositive
23 and it's given less weight when the plaintiff can't articulate
24 a specific link between the forum it prefers and it's
25 preference. And here the only link that's really been

1 articulated is a link that applies to only one set of
2 plaintiffs for only the narrowest subset of their claim.
3 Remember, Your Honor, this is a federal tort claims act case.
4 We've got multiple claims here. And most of the claims when
5 you try to parse out what's in the amended complaint and you
6 try to figure out what facts are actually alleging negligence,
7 what facts are actually alleging intentional infliction of
8 emotional distress, when you actually sift through what's pled
9 an overwhelming majority of what's being challenged here is the
10 separation and the event that happened in and around
11 separation.

12 THE COURT: Okay. What about -- my understanding of
13 the argument that I'm going to hear from the plaintiffs is not
14 only do I give deference to the choice of forum but it would be
15 a great burden on the plaintiffs, they are not wealthy by any
16 means. They do not have the means to travel to Texas, to
17 travel to New Mexico and to litigate. And that if you change
18 venue, you would essentially hamper their ability to -- to
19 indicate their rights.

20 MS. FINKELSTEIN: Your Honor, my understanding is
21 that plaintiffs are well represented by counsel. I -- I --
22 they are certainly welcome to articulate that they would find
23 it to be a hardship to have to litigate in a different
24 district. But they made the choice to move to this district
25 and then to challenge in court under the federal tort claims

1 act, acts that occurred in New Mexico and in Texas. That was
2 their choice. And if the court deems that those are the more
3 appropriate lo -- locals so that a Texas judge can interpret
4 Texas law, which is quite different than Pennsylvania law. Or
5 a New Mexico judge can answer the question about contributory
6 negligence and how that pans out under New Mexico law. The
7 mere fact that they now live in Pennsylvania and that they've
8 chosen to initial their proceedings here shouldn't be
9 dispositive.

10 Moreover, my second response to that argument is that
11 I -- I -- the government doesn't frankly believe that it is
12 going to be an imposition to have to litigate in a different
13 venue. Regardless of where the case remains, if there are
14 depositions that are going to be taken about the separation, if
15 they're federal government employees, they likely are still
16 where the separation occurred. So those depositions are likely
17 to occur in Texas and New Mexico, whether the case is venued
18 here or whether the case is transferred there.

19 Documents that are going to have to be produced are
20 going to have to be produced the same way regardless of where
21 they're located. And so the only real factor that the
22 plaintiffs can articulate that suggests that they should be
23 allowed to remain in this venue is their preference and that
24 shouldn't outweigh all of the other factors. The two that I
25 really want to highlight, although the government believes all

1 of the other factors also would suggest severance and transfer.

2 But the two that I really want to highlight are the
3 local interest in litigating matters of law specific to that
4 locale. This is a federal torte claims act. Your Honor,
5 articulated it perfectly in minute one when my co-counsel was
6 arguing, you essentially said, isn't the federal torte claims
7 act a way that you get into federal court, I'm paraphrasing you
8 a bit. And you bring a state law claim? And the answer is
9 yes. So to the extent that any of the FTCA claims survived
10 we're talking about interpretation of Texas law, New Mexico
11 law, primarily and they're going to be novel.

12 If -- if this case is not dismissed you hit the nail
13 on the head, that other than the other similar challenges
14 brought by similarly situated plaintiffs contemporaneous to
15 this case that we don't have a whole body of case law about
16 characterizing separation for immigration proceedings as
17 negligent infliction of emotional distress. So we're talking
18 about courts making law, applying Texas and New Mexico law for
19 the first time and there is a definite interest in that
20 happening and being enforced by judges who are located in those
21 areas and have an interest in the enforcement of their law,
22 especially when it comes to Texas, which has really strong
23 public policies that weigh onto the questions in this case.

24 The second factor that I want to highlight is judge
25 familiarity. Because while Your Honor, of course, can get up

1 to speed on any of the nuances of -- of different laws, trying
2 to litigate, imagine the trial in this case. If this case goes
3 forward it's an FTCA trial, bench trial, you're the judge.
4 We've got to try this case. You have to make all of these
5 individual decisions about whether Texas or New Mexico law
6 applies, or Illinois law applies and what the differences are
7 between the two of them and apply it differently to the
8 different sets of -- of plaintiffs and it's the government's
9 position that although, of course, Your Honor, would be capable
10 of doing it, judges that are already familiar with Texas law,
11 judges that every day in their FTCA cases are applying New
12 Mexico law are much more readily situated to make these kinds
13 of really nuance decisions about whether or not to expand some
14 of their tortes or apply their tortes in a different context or
15 apply certain defenses.

16 And so while we would argue that all of the Jumara
17 factors aside from the plaintiff's preference would weigh in
18 the government's favor. We think those are two really strong
19 ones and we certainly feel that severance would be appropriate
20 even if Your Honor does not ultimately dismiss all the claims
21 and decide to transfer both sets of plaintiffs. But there's
22 really no articulable reason why a set of plaintiffs who are
23 suing in torte, whose claims are not going to be decided under
24 Pennsylvania law who were never in Pennsylvania at the time the
25 alleged tortes occurred should be allowed to continue to

1 litigate in litigation with another set of plaintiffs that has
2 a very different set of factual circumstances.

3 And for those reasons we would ask that Your Honor
4 dismiss all of the claims in the complaint. But if Your Honor
5 does not dismiss all of the claims in the complaint we would
6 ask for severance and transfer appropriately to the courts in
7 New Mexico and Texas. Thank you.

8 THE COURT: Okay. Thank you very much, counsel.
9 Well, the plaintiffs' counsel has been sitting so patiently.
10 Who would like to proceed?

11 MR. EDLIN: Thank you, Your Honor.

12 THE COURT: Good morning, sir.

13 MR. EDLIN: I'm Richard Edlin. I'm a partner at
14 Greenberg Traurig and we are very pleased to represent the
15 plaintiffs in this case, who are in the courtroom with us.

16 THE COURT: Oh great.

17 MR. EDLIN: Today. With Your Honor's indulgence
18 several of my younger colleagues will take pieces of the
19 argument. At this stage, I guess, all my colleagues wind up
20 being younger, as a point.

21 THE COURT: So they have the advantage of hearing all
22 the questions that the plaintiffs have been peppered with, so
23 --

24 MR. EDLIN: Yes. Well, I -- I hope they've been
25 writing down your questions.

1 THE COURT: Or the defense, I mean.

2 MR. EDLIN: And then I'm sure that they'll have
3 answers for you, Your Honor. But I -- I suppose if I was -- my
4 introductory remarks will go to the overall nature of the case,
5 Your Honor. I suppose if I was the government, I'd argue it
6 the same way. I would try to break it down into pieces and I'd
7 try to pretend that the horror that occurred at the border was
8 just an ordinary piece of business.

9 THE COURT: And when you hear the word horror, don't
10 you start to think about constitutional violation? And we know
11 that in the Third Circuit, a immigration detainee is -- has the
12 same rights as a pretrial detainee, citizen, non-citizen, it
13 makes no difference. Why is this not a constitutional claim
14 that is brought based on the care, custody, control and the
15 treatment of the detainees?

16 MR. EDLIN: Your Honor, my -- my colleague Mr.
17 Friedman, I don't want to steal his thunder on his argument.
18 He will address those issues. We have brought alleged
19 constitutional violations. The claims are claims under the
20 FTCA. But the constitutional violations are pled in the
21 complaint. And Your Honor, you were in the military I
22 understand an aviator before a lawyer in the military.

23 When we send American servicemen into harms way we do
24 that to protect something. And it's the American way of life
25 that we are there to protect. Your Honor, we are there to

1 protect people's rights to live freely within their own
2 borders. Surely, Your Honor, what occurs within our own
3 borders in the United States deserves no less protection for
4 anyone who is within our borders.

5 Your Honor, no one wants a lawless border, but people
6 have the right to come to the United States and seek asylum.
7 People have the right to come to the United States to
8 immigrate. People certainly have the right to come to the
9 United States and seek asylum as our pla -- as our clients did.
10 They also have the right when so seeking to not be tortured for
11 doing it. And it is -- it is not an overstatement. It's not
12 purple prose. It's nothing of the kind to say that when they
13 came and crossed the border pursuant to federal government
14 policy they were tortured. Your Honor, I don't know if you've
15 every had the experience of losing track of a child or a
16 grandchild in a mall for 10 seconds.

17 THE COURT: It was at the farm show out in
18 Harrisburg.

19 MR. EDLIN: Well, I -- I can only imagine how
20 terrified you were for those few seconds or a minute or God
21 forbid, could you imagine a half an hour? This is between one
22 and two months that we are talking about here. This is no
23 minor exercise of -- of government policy. There has never
24 been legitimate government law or statute. There has never
25 been any international law that has allowed a government to

1 torture people seeking asylum within this country. It's why
2 this policy was condemned roundly across the globe.

3 Now, madame clerk, may I ask you to kindly put the
4 power on?

5 THE COURT: Now, as you focus on policy, you're
6 reinforcing the argument that the United States has made that
7 this is all about an attack on policy, which starts to sound
8 like it's an executive political issue, not a judicial issue.

9 MR. EDLIN: Your Honor, there are -- we -- we are
10 living through times when our legal and political issues have
11 become intertwined in ways that have driven the emotions of the
12 country into very polarized positions. And -- and I'm not
13 making any comment about the rightness or wrongness of other
14 cases. What I am saying is there can be no legitimate
15 difference of opinion about whether or not it is all right to
16 torture a parent and a child coming to the border and seeking
17 asylum.

18 Your Honor, the pictures that we see, you'll see a
19 couple of them, if we saw them from other countries we would
20 say thank God we live in America. Now, there is redress in the
21 manner of our pleading for the violations of our clients'
22 rights. And we will walk through that with you and I'm sure --
23 I know Your Honor has questions, and we will do our best to
24 answer those questions. What I am saying to the court, what
25 I'm saying as clearly as I can say is that when we torture

1 people like this when they step over our border, these people
2 are no threat to anybody. There has never been any suggestion
3 that either of these fathers was an unfit parent for the child
4 that they came to the country with. There is no suggestion
5 that these two sets of parent and child could not have been
6 held in the same facility. No suggestion at all of that.

7 Now, federal law, Your Honor, requires the safe and
8 timely placement of children in the least restrictive setting
9 that is in the best interest of the child. That's contained in
10 our -- in our -- in our laws. What happened was, and you can
11 see from the very top of the government, it's then Attorney
12 General Sessions, we need to take away children. You can see
13 from Mr. Miller, then the National Security Council
14 representative and a senior White House advisor, my mantra has
15 persistently been presenting aliens with multiple unsolvable
16 dilemmas to impact their calculus for choosing to make the
17 arduous journey to begin with.

18 Your Honor, this was deterrence, but it was
19 deterrence through terror and through torture. And Your Honor
20 can see the -- the what will be obvious, I believe to the court
21 a naked just awful, lack of integrity in terms of how the law
22 is applied here. This is 2017 memo and it's drafted by senior
23 officials in the Department of Homeland Security, it's in our
24 amended complaint in several places, paragraphs 31, 32 and
25 footnote 18. What is says here is that the government intends

1 to announce that DHS is considering separating family units so
2 a family unit that comes across the border, separating them,
3 placing the adults in detention and through that act change the
4 status of the minor child and now all of a sudden deem that
5 child to be unaccompanied. And now the government can do what
6 it wants to that child.

7 Your Honor, this is a manipulation of the law that is
8 appalling and it was roundly criticized inside and outside of
9 the United States. Now, when these children were separated,
10 and I don't want to mince words here. I'm not suggesting
11 anything other than the truth, taking a child away from a
12 parent, however that is done is a violent act against that
13 family unit. It's violence, Your Honor. There is no nice way
14 to tell a parent that they are taking their child away and
15 sending them thousands of miles away without telling them where
16 they are going or when they would see them again.

17 And under this policy in addition to our clients,
18 4,000 children as young as 4 months old were taken away from
19 their -- from their parents. And Your Honor, for no good
20 reason. That was n -- that is not the law of the United
21 States. This is an abhorrent, unlawful, terrible policy. And
22 you can even see the way this was spoken about in the
23 government. US Attorneys saying, per the AG's policy we should
24 not -- this is an incredible statement, we should not be
25 categorically declining immigration prosecutions of adults in

1 family units because of the age of a child, translation, we
2 don't care how young these kids are. We will take them away
3 anyway because this is going to deter other people from coming
4 to the United States and lawfully seeking asylum.

5 This has nothing to do, Your Honor, with the merit of
6 the asylum case. This has nothing to do with whether or not
7 the government should or should not have granted asylum. With
8 respect to our clients one case, one misdemeanor case as many
9 were was dismissed with time served and one case was dropped.
10 But in any event, regardless of that, the issue here is whether
11 or not children can be ripped away from their parents as a
12 matter of deterrence and as a matter of torture, Judge.

13 Now, the defendant knew full well that it had failed
14 to track these children. I -- I remember reading and it was an
15 awful thing to read that when these children were taken away
16 the government was not sure how to get them back together again
17 with their parents. The El Paso program, the pilot program
18 from 2017, 281 families had their children separated
19 whereabouts unknown. The government itself reported in 2019
20 that it, the government, may have separated thousands more
21 children and they face challenges identifying where they were.

22 The government liked that so well that they expanded
23 it times 20 or more under the zero-tolerance policy. Now, the
24 government says, well the zero-tolerance policy is not under
25 attack. True. But the consequences of it are at issue in your

1 court, Your Honor. The consequences of it, the harm that was
2 done, the tort as you will hear the law of the three states
3 are not so very different. You'll hear that Pennsylvania's
4 choice of law rules cares about whether the laws are terribly
5 different, and if they're not terribly different Pennsylvania
6 law will apply to persons located within Pennsylvania. The
7 government's argument on -- on convenience, you'll hear from
8 another one of my colleagues. The government is present
9 everywhere.

10 The government cannot be inconvenienced by litigating
11 in any of the judicial districts. Again, this happened without
12 any showing that any parent was unfit. Now, these cases have
13 made it to the courts. This is the Ms. L case; this is from
14 the Southern District of California in 2018. We are not, as
15 the government has suggested here today talking about a minor
16 incident where, you know, a child might have gone missing for a
17 little bit.

18 In the words of the district court in California, I
19 won't read all of this, Your Honor, but I've highlighted the
20 things that I think make this quite a different case than the
21 one the government has suggested. The use of children as tools
22 -- the use of children as tools in the parents' criminal and
23 immigration proceedings shows that a finding of likelihood of
24 success is assured. They talk about this policy and the way it
25 was implemented as so egregious, so outrageous that it might

1 fairly be said to shock the contemporary conscience. And it
2 interferes within -- and with the rights implicit in concepts
3 of ordered liberty.

4 It was brutal and it was offensive. Your Honor, we
5 are not talking about minor incidents that occurred. And we
6 are not talking about minor consequences of those incidents.

7 THE COURT: No, but here's what -- we're talking
8 about substantive due process there. We're talking about
9 egregious, outrageous conduct, shocks the conscience. And yet
10 you're bringing these actions under the federal torte claims
11 act so they are simple, ordinary torte claims. These are not
12 ordinary torte claims in any -- even the government would agree
13 with that, these are not ordinary torte claims in any sense.

14 So is your argument about how terrible the policy was
15 and outrageous, doesn't that work against the argument that
16 this is what Congress intended by the federal torte claims acts
17 in its waiver of sovereignty?

18 MR. EDLIN: Your Honor, you've asked a couple of
19 questions again, I -- I don't want to --

20 THE COURT: I know you're going to defer to an
21 associate.

22 MR. EDLIN: Well, I don't want to steal their
23 thunder, but I do want to address Your Honor's questions.

24 THE COURT: Yes, sir.

25 MR. EDLIN: With the understanding that there will be

1 some smarter elaboration on it. Your Honor --

2 THE COURT: Just younger elaboration, not smarter.

3 MR. EDLIN: Your Honor, Ms. Reddy will explain the
4 sovereign immunity waiver here. Now, it features, centrally in
5 the government's argument today. It was not raised at all
6 until the reply brief. So impermissible as that is supposed to
7 be we're -- we will deal with it as well as we can.

8 If Your Honor determines to rule on sovereign
9 immunity against the plaintiffs before doing so we would like
10 an opportunity to brief what Ms. Reddy will discuss at length.

11 THE COURT: Certainly. Which raises another question
12 I should ask now, if I should determine that these claims are
13 deficient in any respect, in part or in all, do you want an
14 opportunity to replead?

15 MR. EDLIN: Yes. Certainly.

16 THE COURT: Just wanted to get that out of the way.

17 MR. EDLIN: Yes, certainly. There again, Ms. Reddy
18 will discuss this, but the United States proposed in the
19 Nuremberg trials that there is a level of civilized, human
20 conduct that no state can avoid submitting to. You cannot, nor
21 does any country have the right to waive Jus cogens as it
22 applies to it. And the waiver issue as it relates to this,
23 again, Ms. Reddy will describe this in more detail, the waiver
24 issue here, Your Honor, should not trouble the court because
25 the government cannot waive these kinds of claims.

1 The reason that I am showing how egregious these
2 claims are, the reason that every civilized country in the
3 world condemned what the United States was doing, and the
4 reason that the prior administration was even forced to
5 withdraw the policy, and the reason that the courts that looked
6 at it used these kinds of words was because what we did
7 violates every norm of civilized conduct. It is not what
8 America stands for.

9 THE COURT: And I need to interrupt you a moment. I
10 apologize, sir. But you said cannot waive. I think what you
11 were saying, I want to make sure is you were actually saying
12 the government cannot immunize itself, that there's no existing
13 automatic immunization.

14 MR. EDLIN: Yes, Your Honor.

15 THE COURT: And in fact, they cannot immunize
16 themselves from liability.

17 MR. EDLIN: For certain things.

18 THE COURT: Okay.

19 MR. EDLIN: And when those things rise to the level
20 of -- of the kind of conduct, Your Honor, mentioned the king
21 can't be sued unless the king agrees. Well, that's true almost
22 all the time. Unless the king engages in conduct that is so
23 against the norms of civilized society and the international
24 community that the international community can condemn it. And
25 that is the whole point of what was gotten at in Nuremberg led

1 by the United States. That principle exists.

2 Your Honor, I then would move on. What the
3 government -- what we did, what the United States government
4 did was to offer those -- to offer my clients and to offer
5 those like our clients with a horrible, shocking, brutal
6 choice. This is a federal form and it's probably large enough
7 on the screen, if Your Honor can -- can read that. But what
8 the government offered people was a choice between leave with
9 your child and leave without your child, but you had to leave
10 one way or the other. That was a federal form that was throwed
11 in front of these people during the course of their unlawful --
12 the unlawful separation that was going on with them and what
13 they hoped. But that people would say, well, let me just take
14 my child then and get out of here. So we'll torture you and
15 then we will give you this brutal choice.

16 Now, when it shows up in the movies, we've seen it
17 before. We've seen this movie before. This kind of a choice
18 should never be imposed on a parent. It should never be
19 imposed by the United States on people lawfully seeking asylum.
20 Your Honor, I'm sure you're aware of the timelines, but the
21 simple fact of the matter here between our two clients, and we
22 can -- it's in our pleading and, of course, we can submit this
23 short presentation so it might be a little easier to -- to see.

24 But both of our clients were detained at the border.
25 Both of our clients were subjected to the same policy. Both of

1 our clients were separated for between one and two months.
2 None of that was appropriate. Both of our clients were
3 subjected to all of the terrible consequences and the tortes
4 that under the law of all of these states, all of these states
5 are not so different. The differences are minor differences.
6 None in either Pennsylvania nor Texas nor New Mexico counten --
7 countenances the consequences of this type of brutality.

8 THE COURT: Now, these children were removed from
9 their fathers?

10 MR. EDLIN: Yes.

11 THE COURT: Who removed them from their mothers? And
12 where are their mothers and do their mothers have any say in
13 this matter?

14 MR. EDLIN: The mothers, I believe are -- are not in
15 the United States and the mothers are not protesting any of --

16 THE COURT: So as far as you know, they gave
17 permission for the father to take the child?

18 MR. EDLIN: That's our understanding, Your Honor.

19 THE COURT: And when they were reunited did the
20 mothers ever get reunited with their children?

21 MR. EDLIN: I do not --.

22 MS. REDDY: Yes.

23 MR. EDLIN: Yes.

24 THE COURT: You're going to address that. Okay.

25 MR. EDLIN: In both cases?

1 MS. REDDY: I believe in both cases, yes.

2 MR. EDLIN: Yes. In both cases, Your Honor. So --
3 so the point, Your Honor, and maybe we can think of it this way
4 for many crimes there is also an analog under the civil law.
5 So it is not one or the other. I can be both and that is what
6 we are dealing with here today. Your Honor asked about the
7 intent behind the statute. I just want to touch that briefly
8 again, understanding my remarks will be a little bit limited.

9 It would be hard to imagine Congress passing a law
10 that says, that what if we go ahead and torture people? What
11 we need to do is apply the law as is written to these facts and
12 when we do so, as we have done in our complaint we've satisfied
13 all of our pleading requirements under the words and language
14 of the statutes. It would be -- it is -- it is often the case
15 that as situations change we apply the laws without ever
16 necessarily knowing that Congress would have thought of or
17 intended a particular issues, but we apply the laws as they're
18 written.

19 THE COURT: Would you have expected Congress to put a
20 private right of action in the immigration laws for
21 mistreatment or the like? If they intended that to fall under
22 the federal tort claims act, would it not have been more
23 express and clearer if they actually put in the immigration
24 laws a private cause of action for immigrants?

25 MR. EDLIN: Your Honor, sometimes they do and

1 sometimes we've found private rights of action under the laws
2 that have not been put in, but we've read it and we've read the
3 statutes and sometimes -- sometimes it works and sometimes it
4 doesn't. I believe here, I believe we have appropriately pled
5 under the A -- ATS and the federal tort claims act, pursuant to
6 the language of those statutes and pursuant to the underlying
7 laws in the states that we've been looking at, Pennsylvania,
8 Texas and New Mexico.

9 THE COURT: And a think, not to paraphrase you, but I
10 think what you're saying when you talked about not being able
11 to immunize yourself for such outrageous behavior, that's more
12 under the ATS, the two ATS?

13 MR. EDLIN: That's the ATS, yes. Yes, Your Honor.
14 Now, we're not talking about a situation in which the courts
15 have only looked at the situation in total, but -- but in the
16 Northern District of Illinois, Your Honor, our client here
17 C.D.A.'s specific circumstances were evaluated there. And
18 again, in very, very similar language used in California, what
19 the court there said was that the irreparable harm inflicted on
20 the boys, because there was another boy involved WSR in that
21 case, reinforces why the separation shocks the conscience.

22 Your Honor, we're here at the pleading stage. We
23 have more than sufficiently pled the tortes that we have
24 alleged and the government will have an opportunity and we will
25 have an opportunity to explore all of this in discovery. But

1 to shut the door, the justice of this court at this stage where
2 a pleading which I believe satisfies all of the pleading
3 requirements incumbent upon us, Your Honor, frankly, I think
4 would just be the wrong decision.

5 Now, this -- this policy as we have said, this was
6 not -- this is not a close question, and this touches on Ms.
7 Reddy's argument on whether you can immunize yourself, but
8 there was an international uniform outcry among the civilized
9 nation against this policy. This policy was not something that
10 didn't rise to that level. It does rise to that level.

11 The harm that is encountered by that is recognized in
12 numerous places by the government itself. Now, on the left are
13 two columns that are from Office of the Inspector General
14 documents themselves. So this is not us putting this together,
15 this is from the OIG, the two left columns, and they both talk
16 about the harms, the physical harms and the emotional harms,
17 all of the harm that is suffered when young children are
18 separated from their parents, physical symptoms, Your Honor.

19 On the right I want to hasten to say, the quote on
20 the right, this case is not in our briefing, but when you
21 search out cases, case after case on the right side, JP vs.
22 Sessions again, Central District of California. It also
23 acknowledges the kind of trauma that the acts that the
24 government engaged in here, the kind of trauma that occurs.
25 There is no dispute about this. There is no legitimate dispute

1 about this.

2 Now, the top of the government, my -- my colleagues,
3 counsel over here work for the US Attorney in this district.
4 The US Attorney in this district serves at the pleasure of the
5 President of the United States. The president has said, if in
6 fact, because of the outrageous behavior, that word comes up a
7 lot. Because of the outrageous behavior of the last
8 administration, you coming across the border, my clients,
9 coming across the border, whether it was legally or illegally,
10 and you've lost your child, your child is lost, it's gone, you
11 deserve some kind of compensation, no matter what the
12 circumstances. We agree with that. That's the top of the
13 government, in effect, their boss saying this.

14 Your Honor, we are simply here seeking exactly what
15 the President of the United States has said we are entitled to.
16 This is not a -- a crazy, outrageous claim.

17 THE COURT: Well, shouldn't Congress pass a law
18 providing for compensation and the president should sign it and
19 then it be implemented and compensation paid?

20 MR. EDLIN: Your Honor, that could happen. We
21 believe the laws that are already in place more than adequately
22 protect our clients' rights and, of course, you have a tabletop
23 briefing on all of this.

24 Sometimes a picture speaks a thousand words. If you
25 said that this was coming yesterday from Ukraine, I would

1 believe you. And if you said that 25 years ago this was coming
2 from Bosnia, I'd have believed that too. What I would never
3 have believed is that this is a picture of what we did to
4 children in the United States.

5 THE COURT: Are you sure we're not doing that today?

6 MR. EDLIN: I'm sorry?

7 THE COURT: If you took pictures down at the southern
8 border today are you sure you would not see similar images?

9 MR. EDLIN: I'm not sure what I would see at the
10 southern border today. I know that this happened in the
11 current period of time that the complaint speaks to as a
12 function of what the government policy and actions incurred and
13 what I'm saying to the court is, I don't care when this picture
14 was taken, I would never have expected this to be a picture
15 taken in the United States.

16 THE COURT: And I think the point you're trying to
17 make isn't so much that those blankets are strange, but they're
18 supposed to be very effective, I don't know. But is children
19 separated from the parents is what I'm supposed to take from
20 that picture.

21 MR. EDLIN: Yes.

22 THE COURT: Not so much that the beds aren't very
23 good because they're not. The blankets aren't very good,
24 because they're not. But I think the image is more to stress
25 the point that all these children are here without their

1 parents.

2 MR. EDLIN: All without their parents and is it any
3 surprise --

4 THE COURT: Because this isn't about the care
5 conditions of the facility where the children were held, it has
6 to do with the separation.

7 MR. EDLIN: It does, Your Honor. And is it any
8 wonder that children treated like this are suffering from the
9 tortes inflicted upon them. Now, I've probably taken up more
10 than my time. You'll have many questions for my colleagues. I
11 believe Mr. Friedman is going to speak next and he's going to
12 deal with the discretionary function and related defenses.

13 THE COURT: Thank you, very much, sir.

14 MR. EDLIN: Your Honor, thank you very much for your
15 time.

16 MS. FINKELSTEIN: Your Honor, our screen blinked off
17 sometime right around Meryl Streep. I don't know --

18 THE COURT: Oh, your screen is not working?

19 MS. FINKELSTEIN: No, and that one's not either.

20 THE COURT: This is my -- Deputy Fitzko is the
21 expert.

22 MR. ST. JOSEPH: Now, we don't have --

23 MS. FINKELSTEIN: So well, that one keeps
24 periodically -- what it does. Like it will come and ago. I
25 don't know if there's going to be -- I'm not sure if there's

1 going to be additional presentations.

2 THE COURT: Do you have a further Power Point
3 presentation?

4 MS. FINKELSTEIN: Or whether there's law on it or
5 just images.

6 THE COURT: Do you have a further Power Point
7 presentation.

8 MS. REDDY: We do have one, Your Honor.

9 THE COURT: Okay. Let's see, can -- if it's not this
10 one we can -- well, why don't we -- why don't we take a ten-
11 minute recess and see if we can get the system --

12 MR. EDLIN: Thank you, Your Honor.

13 THE COURT: -- and working.

14 MR. EDLIN: Thank you, Your Honor.

15 THE COURT: We'll stand in recess for ten minutes.

16 MR. ST. JOSEPH: Thank you, Your Honor.

17 THE CLERK: All rise.

18 BRIEF RECESS

19 THE CLERK: All rise.

20 THE COURT: You may be seated. Thank you.

21 MR. EDLIN: Thank you, Your Honor.

22 MR. ST. JOSEPH: Thank you, Your Honor.

23 THE COURT: The court is called to order all parties
24 previously present are once again present. I believe was it
25 Attorney Reddy who was coming in next? Or --

1 MS. REDDY: It was Mr. Friedman.

2 THE COURT: Mr. Friedman.

3 MR. FRIEDMAN: Good morning, Your Honor.

4 THE COURT: Good morning, sir.

5 MR. FRIEDMAN: My name is Daniel Friedman. On behalf
6 of the plaintiffs, I'm going to be addressing a portion of Mr.
7 St. Joseph's argument. I'm going to be addressing the
8 exceptions of FTCA liability and my colleague Mr. Bailus will
9 be addressing the questions of Texas, New Mexico and
10 Pennsylvania law.

11 THE COURT: Very well.

12 MR. FRIEDMAN: So I'm going to start with the five
13 claimed exceptions that the government raises to FTCA
14 liability. But two points before I get into the specific
15 exceptions, first, points of agreement, plaintiffs' claims are
16 not constitutional claims. Plaintiffs' claims are state law
17 tort claims. They are common law torts for which any private
18 person would be liable. And just because these are common law
19 tort claims doesn't mean the government's conduct is any less
20 egregious or horrifying. It just means these claims can be
21 brought under state law.

22 THE COURT: It is often time, often times difficult
23 to look at the United States as being a -- a private person,
24 because a private person couldn't have done this. Right? This
25 could only have been done pursuant to a governmental policy.

1 So the United States shall be liable respecting the provisions
2 of this title relating to torte claims in the same manner and
3 to the same extent as a private individual under like
4 circumstances. Can you imagine a private individual being
5 under like circumstances where they could remove you from your
6 child?

7 MR. FRIEDMAN: Yes, Your Honor. And we do cite
8 Pennsylvania cases in which an attempt to separate a parent and
9 a child was cognizable under Pennsylvania law as intentional
10 infliction of emotional distress. But we're probably jumping
11 straight to the no private analog exception to liability.

12 Cases interpreting that exception have found that
13 FTCA claims can be brought in the context of immigration and
14 criminal law. The government in their moving brief at least,
15 this is at page 33 of their moving brief argues any FTCA claim
16 related to the enforcement of criminal or immigration law
17 cannot be brought because private citizens cannot carry out
18 criminal led immigration laws. And we cite a litany of cases
19 where the FTCA and its waiver of sovereign immunity was found
20 to apply in the immigration and in the criminal context.

21 One of the cases that the government cites in its
22 brief of Olos Palma v. The United States. It was a District of
23 New Jersey case. There and FTCA claim was allowed to proceed
24 against the government for wrongful deportation. There the
25 government was carrying out immigration laws, the District of

1 New Jersey said because this conduct is analogous to what a
2 private individual can do and be liable for under tort law, we
3 allow this claim to proceed.

4 So this no private analog exception really looks to
5 broader categories of conduct to say this is not what a private
6 individual does. The cases that the government cites applying
7 this exception to say you can't bring an FTCA claim are, one,
8 Ferris v. United States, which is the military context. And
9 there the government says the military is its own thing.
10 Private citizens don't have the military they don't have the
11 kind of command structure that a military has.

12 THE COURT: If it doesn't visit --- doesn't present -
13 - prevent a military person from bringing the very same lawsuit
14 that now an undocumented migrant can bring?

15 MR. FRIEDMAN: Yes. And that is because the
16 uniqueness of the military, which I won't pretend to understand
17 the same as Your Honor has, but -- does, but that was the whole
18 thing is Ferris, was that the military -- you can't bring an
19 FTCA, you can't bring a state law tort claim in the military
20 context. Similarly, the only other case applying this doctrine
21 that the government cites is where some aspect of the
22 government refused to issue a passport and the holding there
23 was that -- I'm just going to get the name of the case for Your
24 Honor.

25 THE COURT: Sure.

1 MR. FRIEDMAN: Well, it's in the government's brief.
2 That issuing a passport is not something that a private citizen
3 can do because that is uniquely governmental, no FTCA claim can
4 lie. But there is no broad exception for criminal or
5 immigration laws. In fact, many FTCA cases, and we list them
6 in our opposition brief are brought in the context of criminal
7 and immigration legal enforcement.

8 THE COURT: And I think the government all but
9 conceded if they were driving someone who was in an immigration
10 context or the slip and fall at a detention facility that would
11 -- I think the government conceded would fall under the federal
12 tort claims act.

13 MR. FRIEDMAN: Yes, I believe so. Just because it's
14 in immigration or in the criminal context doesn't mean it's
15 immune from the act, or separate from the act.

16 The second point of agreement between the parties in
17 this action is that the plaintiffs are not challenging the
18 zero-tolerance policy or the family separation policy. I
19 believe Mr. St. Joseph said in his argument that this is not a
20 systemic challenge. And we agree with that. We are not
21 challenging the policies. There's no need to challenge the
22 policies for two primary reasons. One, because the prior
23 administration and the current administration have disavowed
24 the policies and two because when the policies were challenged
25 they were found to be unconstitutional even as applied to our

1 clients, C.D.A. -- well, C.D.A. was the plaintiff in that
2 action. It was found to violate due process rights. And I
3 believe it was going to violate substantive and procedural
4 rights. So the Northern District of Illinois already found
5 this policy as unconstitutional.

6 THE COURT: That again raises that issue I've asked
7 multiple times, why is this not brought as a deliberate
8 indifference care, custody, control pretrial, pretrial detainee
9 type of case under -- under the 14th Amendment, the 5th
10 Amendment. Why is it brought under the FTCA and a negligence
11 standard, et cetera?

12 MR. FRIEDMAN: So the FTCA and -- well, first you
13 can't bring constitutional claims under the FTCA. You
14 necessarily must bring --

15 THE COURT: Right.

16 MR. FRIEDMAN: -- a state law tort claim. You
17 cannot bring a constitutional claim against the government.

18 THE COURT: Right.

19 MR. FRIEDMAN: So the FTCA and the Bivens doctrine
20 are meant to be complimentary. That --

21 THE COURT: If always narrowly construed.

22 MR. FRIEDMAN: I'm sorry?

23 THE COURT: And they are also always narrowly
24 construed. In other words, we're not expanding out the rights
25 to sue under a constitutional theory against the United States.

1 Those are also very narrowly construed. Bivens is very
2 narrowly construed. Rivera reluctant to expand it out. Is
3 that the reason why this was not brought as a constitutional
4 claim against the individuals who actually violated the rights
5 of these people. Rather it's brought against the United States
6 itself under the FTC act. Is that -- is that the reason?

7 MR. FRIEDMAN: Because we believe we can get full
8 redress by bringing these claims against the United States.

9 THE COURT: Okay.

10 MR. FRIEDMAN: Now, --

11 THE COURT: Although, whether the FTCA there's no fee
12 shifting; correct? There's no punitive damages. You'd be in -
13 - even if you get over the immunity from suit you've got to get
14 over the different limitations on liability and what you're
15 allowed to recover, but that's for another -- sorry for the
16 interruption.

17 MR. FRIEDMAN: Now, Your Honor has mentioned a couple
18 of times that the FTCA is to be interpreted narrowly the way it
19 waives sovereign immunity contained within it is to be
20 interpreted narrowly. But the government does not actually
21 contest the waiver of sovereign immunity under the FTCA, what
22 the government is arguing is that there are exceptions to that
23 waiver.

24 THE COURT: Right.

25 MR. FRIEDMAN: The government bares the burden of

1 proving those exceptions and the exceptions themselves also
2 must be interpreted narrowly. So because we are in the land of
3 exceptions to the waiver.

4 THE COURT: The burden has somehow shifted over to
5 them.

6 MR. FRIEDMAN: Starting with the discretionary
7 function exception. This is the first of the five e -- excuse
8 me, that the government raises. Under the discretionary
9 function exception, the government has the burden of showing
10 that the federal actors had an element of judgement or choice,
11 and secondly that the discretion was subject to a policy
12 analysis.

13 And we believe the discretionary function exception
14 doesn't apply for three different reasons. First, as Your
15 Honor, mentioned because the people that came in contact with
16 plaintiffs had no discretion under the policy. It was called
17 the zero-tolerance policy. It was not a policy of discretion.
18 And therefore, the discretionary function exception does not
19 apply to all of those government actors. Second, even if you
20 want to look at the government itself --

21 THE COURT: Now, I got to stop you again. So okay,
22 so this is where it gets so interesting. So the actors, the
23 federal employees who have caused the harm, if they didn't have
24 discretion that means the policy that they are following. The
25 policy itself is causing negligent conduct. How do you --

1 because under the federal tort claims acts, we have to prove
2 negligence. Negligence by the United States acting through its
3 employees. So when you say they had no discretion, what you're
4 saying is they were implementing the policy of the United
5 States. So under the federal torts -- tort claims act you
6 have to find that -- let me ask you, as a question. Do you
7 have to find that the people who are implementing the policy,
8 the federal actors are negligent or can you prove a claim by
9 saying the policy itself is negligence? That when you -- when
10 you implement the policy even if you do it exactly the way it's
11 written it will result in negligent conduct, or if the
12 intentional inflection were allowed, intentional conduct?

13 Like who -- whose -- where's the negligence? Is it
14 the people that made the policy? And if it's the people that
15 made the policy they're clearly policy makers, that's clearly
16 discretionary. So if it's the people who made the policy who
17 are negligent, you can't go. So it's got to be the people who
18 drove the post truck, the person who caused the tort, you
19 know, caused the injury. So it's the federal actor. Well, the
20 federal actor is doing exactly what the policy says they are
21 supposed to do. Zero tolerance, this is what you will do and
22 they do it exactly the way they're supposed to, then you have
23 to be arguing that the policy called for federal -- federal
24 employees to act negligently; is that right?

25 MR. FRIEDMAN: Well, Your Honor, I think every

1 element is acting neglig -- negligently and I would also point
2 out that we have intentional claims as well as Mr. Edlin
3 pointed out in detail these were intentional actions being
4 carried out by the government.

5 THE COURT: Well, all I'm -- I'm focusing mainly on
6 just the FTCA. There is an intentional infliction of distress.

7 MR. FRIEDMAN: Yes.

8 THE COURT: And abuse of process you could argue, but
9 for the most part --

10 MR. FRIEDMAN: The five elements of intent.

11 THE COURT: -- their negligence state claims that
12 fall under negligence and so would you agree, and I know this
13 is more rhetorical, that if the policy maker is the one that's
14 negligent by creating a policy that resulted in harm then
15 that's discretionary function, I believe. There's no more
16 discretionary function than the creation of policy. That's
17 what our -- our policy makers do. If the actual person that
18 removed the father from the child, that person were they
19 negligent and if they were negligent is it because they
20 violated something under state law or is it because they
21 followed a policy that by its very nature required them to act
22 negligently or intentionally in violation of your clients'
23 rights?

24 MR. FRIEDMAN: Well, Your Honor, it doesn't have to
25 be an either/or choice. They can be following the policy and

1 violating state law. And I would analogize this to the due
2 care exception which I was going to turn to next.

3 THE COURT: Right.

4 MR. FRIEDMAN: That the due care exception says that
5 if you are taking an action specifically prescribed by a
6 statute you are immune from liability under the FTCA and
7 exercising due care and we'll come to that. That doesn't apply
8 to a policy. A policy is as you were saying it's -- it's not a
9 statute, it's not a regulation, it's not the constitution. So
10 these are actors choosing to act in a torturous way.

11 But moving on, you can -- as you know --

12 THE COURT: And the actor being the person that's the
13 immigration officer on the ground that's separating them.

14 MR. FRIEDMAN: Yes.

15 THE COURT: Okay.

16 MR. FRIEDMAN: Well, the -- so the immigration --

17 THE COURT: That's implementing the policy.

18 MR. FRIEDMAN: The immigration officer on the ground
19 is acting without discretion and therefore the discretionary
20 function exception does not apply to that person's conduct.

21 THE COURT: Okay.

22 MR. FRIEDMAN: At the higher levels of government,
23 and this is the second reason the discretionary function
24 exception doesn't apply. Because the government doesn't have
25 the discretion to violate the constitution and as Your Honor

1 noted in asking questions of the government every court that
2 has looked at this question under a constitutional analysis has
3 found that there is a constitutional violation.

4 THE COURT: Right, but this is not brought as a
5 constitutional violation it's brought on the FTCA. I'm still
6 having trouble getting the relationship, the dynamic between
7 the constitutional violation and FTCA, because normally we see
8 constitutional violations brought as a civil rights action. We
9 don't see it brought under the FTCA. We see the slip and
10 falls, we see the -- the car accidents, et cetera. We don't
11 see a medical malpractice from a civilian who's married to a
12 military person in a military hospital.

13 Well we don't normally see what look on their faces
14 constitutional violations under the due process clause coming
15 under the FTCA. That's -- that's the problem, so when you
16 reference the consti -- and we have a different standard for
17 constitutional violations et cetera. It was rhetorical, but
18 you can see why the tug and pull there, between a
19 constitutional violation versus an FTCA violation.

20 MR. FRIEDMAN: Well, Your Honor, if you look at the
21 structure of the argument and plaintiff -- defendant's motion
22 to dismiss, the government's motion to dismiss. It becomes
23 clear why the constitutional violation is only looked at later
24 on. We bring state law tort claims under the FTCA. Now, the
25 government argues the discretionary function exception applies.

1 And it's only at that point that the constitutional violation
2 becomes relevant because in order for the government to argue
3 the discretionary function exception applies they need to show
4 there was no constitutional violation. So that's why -- it
5 doesn't have to be in our complaint. Is it in our complaint.
6 We do allege violations of due process under the 5th Amendment,
7 but it's only at this point once the government --

8 THE COURT: It's only to address the discretionary
9 function aspect.

10 MR. FRIEDMAN: Correct. Moving on. So every court
11 that has analyzed the question of the family separation policy
12 and the zero-tolerance policy constituted a constitutional
13 violation has found that it does.

14 THE COURT: In that violation is the family integrity
15 violation, that's the right that's being violated?

16 MR. FRIEDMAN: Yes, it's found to be a liberty
17 interest under the 5th Amendment. And it's both a substantive
18 and a procedural right. I -- I think Your Honor mentioned
19 earlier that we were talking about substantive due process.
20 That's true but there's also a procedural element before
21 separating the parent and the child. Both parent and child are
22 entitled to process. So the government tries to extend the
23 Bivens doctrine of qualified immunity into the context of the
24 FTCA.

25 But there are very good reasons why qualified

1 immunity applies to individual government actors, but not to
2 the United States.

3 THE COURT: Right.

4 MR. FRIEDMAN: I'm reading from Lumia v. United
5 States, a DC Circuit case that qualify -- and this is quoting a
6 Supreme Court case, qualified immunity is directly tied to the
7 risk that fear of personal monetary liability and harassing
8 litigation will unduly inhibit officials in the discharge of
9 their duties. This is not a consideration that applies to the
10 United States.

11 THE COURT: Right.

12 MR. FRIEDMAN: The United States doesn't have concern
13 about --

14 THE COURT: But it's got sovereign immunity. But
15 you're right, qualified immunity is to protect the individual
16 from being individually liable.

17 MR. FRIEDMAN: And I would add in the recent Southern
18 District decision from June D.J.C.D. v. United States. I
19 believe that was the first court to consider this sovereign, or
20 qualified immunity argument in the context of the family
21 separation policy. This case was not in our papers because it
22 came out after our papers. It clarified that the FTCA looks at
23 the United States as if it was a private individual. That is
24 the language of the statute that we've put the United States in
25 the shoes of a private individual.

1 A private individual does not have qualified
2 immunity.

3 THE COURT: No. But you know what's interesting,
4 under the FTCA it does provide that with respect to any claim
5 under this chapter the United States shall be entitled to
6 assert any defense based upon judicial or legislative immunity
7 which would otherwise have been available to the employees.
8 But that goes towards just that, absolute judicial immunity and
9 legislative immunity for legislators, et cetera. It doesn't
10 go, I don't believe that qualified immunity in any way is
11 implicated by that permission of the FTCA. I think qualified
12 immunity is simply a doctrine to protect individuals,
13 government employees from being sued in their individual
14 capacity while they're -- if they are sued in their official
15 capacity then it's the United States that is sued.

16 MR. FRIEDMAN: Yes, Your Honor. The third reason
17 that the discretionary function exception is inapplicable to
18 our claims is because the government tries to carve discrete
19 elements of our claims and says this was a discretionary
20 function, this was a discretionary function. In it's moving
21 brief, the government highlighted the decision to prosecute the
22 fathers and the conditions of confinement. In their reply
23 brief they add a third term, statements made during the
24 reunification process. I believe that was referring to that
25 family reunification form.

1 Now, in order for the discretionary function
2 exception to apply, each and every alleged act must fall within
3 the exception. That's a quote from Prescott v. United States,
4 a Ninth Circuit case from 1992. The government by carving out
5 these discrete elements of plaintiff, of plaintiffs' claims
6 ignores the entire period of family separation after the
7 criminal prosecutions were over, in Mr. A.'s case with time
8 served and Mr. Q.'s case with a dismissal and the
9 reunification. They do not even argue that the decision to
10 keep parents and children separated -- separate at that point
11 is subject to the discretionary function exception.

12 Moving on to the due care exception, this is the
13 second basis that the government argues. The due care
14 exception like the discretionary function exception is the
15 government's burden to show. Two elements to it that the
16 conduct was specifically prescribed by statute and the
17 government exercised due care in carrying out that statute.
18 First the government doesn't point to any statute that required
19 family separations, instead it was the policies, the zero-
20 tolerance policy, the family separation policy and as soon as
21 those policies were revoked by the prior administration
22 families were reunified.

23 So because this was subject to a policy it is not
24 subject to the due care exception. But I would point out the
25 government doesn't even argue that the government actors had

1 due care in separating parent and child, particularly in
2 regards to the plaintiffs in this case because there was no due
3 care. There's no even -- there's not even an allegation of due
4 care, the due care exception doesn't apply.

5 THE COURT: Now, if there had been a specific statute
6 of regulation that provided for if you came across the border
7 illegally, let's say there was a legitimate reason, when
8 detention facilities could only accommodate children or adults
9 and we didn't want to mix children with adults, et cetera and
10 there was no other choice, would due care then be to make sure
11 that was accomplished in an appropriate manner to protect the
12 safety health and welfare of both the adult and the child.
13 Would that be the due care if, in fact, it was not simply a
14 policy, and that's an issue. Where you get statute regulation
15 and then policy of implementation. Would that be due care, if
16 they didn't handle them properly in the way they went about the
17 separation?

18 MR. FRIEDMAN: I -- I believe so, Your Honor. We
19 cite cases in our opposition brief describing what the standard
20 of due care means in the context of the FTCA. But as Mr. Edlin
21 pointed out, this was a situation where the government couldn't
22 even track where the children were in relation to their
23 parents. It took them an unreasonably long time to reunite
24 families. And the Ms. L opinion notes that the government was
25 better at tracking the property of people coming across the

1 border than they were tracking their children. So I don't
2 think there's any claim and the government doesn't make any
3 that they acted with due care in this situation.

4 We've addressed the no private analog exception, but
5 just briefly, the government makes the argument that there
6 cannot be FTCA claims when the government is acting in the
7 context of criminal and immigration law. We cite a number of
8 cases in which FTCA claims were allowed to proceed in the
9 criminal and immigration context. We also cite a number of
10 state law claims showing that there is -- that the tortes that
11 we bring are analogous to the conduct of the government here.

12 Now, analogous doesn't mean exactly the same. The
13 government can never be acting exactly as a private citizen
14 does, but under the FTCA the court looks for the most
15 reasonable analogy. We cite a number of cases in which similar
16 conduct that is a reasonable analogy to the government's
17 conduct here was found to be actionable under the FTCA. And I
18 would point out that we raise a number of cases from Texas and
19 New Mexico in which private analogs were found that the
20 government does not even rebut in their reply brief.

21 The government argued a fourth basis in its motion to
22 dismiss. I'm not sure they're still pursuing this one, but
23 they say that we're challenging -- we're bringing systemic
24 claims. As discussed earlier, we're not bringing systemic
25 claims to challenge the policy, there is no need to challenge

1 the policy. And I believe the government has abandoned this
2 argument here today. Just because there are many victims of a
3 policy does not mean that each of those victims are not
4 entitled to bring a tort claim against the government. It
5 would be odd if you could be immune from tort liability simply
6 because your tort has many victims.

7 The one case that the gov --

8 THE COURT: I'm just thinking a non-citizen does not
9 have more rights than a citizen. So if a citizen wants to
10 bring a claim for intentional infliction -- well that's not a good
11 one because those are hard to prove just because of the
12 requirements of an intentional infliction of emotional
13 distress. But let's say negligent emotional could be made out.
14 So suppose it really upset me that the government taxed me. So
15 the government makes me pay taxes. I'm upset by that. I think
16 they were negligent in the way they went around giving me a
17 notice that my taxes were overdue when they weren't overdue.
18 You know, they were made in mistake so I sue them for negligent
19 infliction of emotional distress under the FTCA after going
20 through the proper process. Why can't I do that?

21 MR. FRIEDMAN: Well, I think there's a standing issue
22 if you're saying you were not treated differently than any
23 other person?

24 THE COURT: No, this one had to do with me. Let's
25 say, this would never happen, but let's say I got a notice that

1 my taxes were overdue and they weren't. I paid them. That
2 came specifically to me, I paid my notice and I got very upset
3 about it. I spent a lot of money with the accountant to prove
4 that I had paid the taxes, et cetera, but I can't sue the
5 United States government over that. I'm trying to think just
6 as I sit here because I just thought of it, what prevents me
7 from suing the United States under state law theory of
8 negligent infliction of emotional distress because they -- that
9 agent was wrong. Whoever sent me that notice was wrong and
10 they sent me a notice. Is there anything that prevents me from
11 bringing a state law tort claim under the federal tort claims
12 act for negligent infliction of emotional distress?

13 MR. FRIEDMAN: Your Honor, I'd say if you have a
14 state law tort claim and there's no exception under the FTCA
15 and it's not like this systemic claims exception exists in the
16 statute, then you are allowed to proceed under the FTCA, even
17 if many other people have the same claim. Just because many
18 other people have the same claim doesn't mean it's not a claim
19 you can bring.

20 THE COURT: That's a great answer because that was a
21 stupid question. So -- good answer to the question.

22 MR. FRIEDMAN: Thank you, Your Honor. And finally,
23 the government raises the independent contractor exception.

24 THE COURT: Well, that's only for that small portion.
25 I had the independent contractor exception come up before with

1 respect to this particular facility and I don't -- so I was
2 pretty familiar with the contract between the government and --
3 and INS and I think in that case I found that the contractor
4 exception did apply, but I don't know and I obviously, would be
5 reanalyzed onto this case. But that particular issue is only
6 for kind of the less important issue here, isn't it? It's just
7 about what happened at the Reading facility with a very small
8 part of this case, the bed checks or whatever. Is that
9 correct, or am I missing that?

10 MR. FRIEDMAN: I wouldn't refer to it as less
11 important. I would say that --

12 THE COURT: Well, it's less important only because
13 the separation was what we're really focused on here; right?
14 We're not really focused on the -- how they were treated when
15 they were detained, et cetera, whether they got adequate food,
16 whether they had adequate bed, whether they should have been
17 woken up. I mean, that's not the big issue. The big issue is
18 that they were separated from -- the father was separated from
19 his son; correct?

20 MR. FRIEDMAN: Yes, Your Honor. And -- and that's my
21 point that each of our claims, would still proceed even if that
22 part was taken out of the case.

23 THE COURT: Right. That would only apply to the --
24 what happened at the Reading facility.

25 MR. FRIEDMAN: Right.

1 THE COURT: The contractor exception.

2 MR. FRIEDMAN: Correct, Your Honor. And as Your
3 Honor mentioned you had a case regarding this facility a few
4 years ago and there's a lot of jurisdiction discovery to
5 proceed. If Your Honor is inclined to consider this
6 independent contractor exception we think jurisdictional
7 discovery again would be appropriate because that case was a
8 few years ago under a different administration and with
9 different immigration enforcement policies.

10 But I don't think we need to get there because even
11 if that exception applies it wouldn't result in the dismissal
12 of any of plaintiffs' claims, none of plaintiffs' claims are
13 dependent on the conde -- on the conduct that happened at that
14 facility. It's definitely horrible conduct and makes the
15 claims worse, but without it none of the claims are dismissed.

16 And I'm going to turn over, unless there are any
17 other questions?

18 THE COURT: No. Thank you, very much, sir.

19 MR. FRIEDMAN: Mr. Bailus is going to address Texas
20 and New Mexico and Pennsylvania law on the individual claims.
21 Thank you.

22 THE COURT: Thank you.

23 MR. EDLIN: Your Honor, would -- would you permit me
24 a short comment?

25 THE COURT: Absolutely, sir.

1 MR. EDLIN: Thank you. Thank you, Dan, excellent
2 job. I just want to make sure that Mr. Friedman's point on the
3 very first point got through. Your Honor, had a very
4 typsilagism (phonetic) that I think without the answer coming
5 across would be bad for us. So the if individual actors don't
6 have discretion the policy makers have all of the discretion,
7 aren't you out of luck? And I think what Mr. Friedman said
8 was, well, in that circumstance individual actors at the top,
9 if they don't have discretion to violate the constitution.

10 So the answer to your question is why is the
11 complaint pled this way? We're feeding the tort claims under
12 the FTCA. But the government has a burden to prove the
13 discretionary function. And we are entitled to defend that by
14 arguing that they do not have a right to violate the
15 constitution. So that defense you might imagine in another
16 type of circumstance in a commercial case for example,
17 extortion is a defense to bribery in Pennsylvania.

18 You can imagine certain claims being posed, a counter
19 claim for bribery and a defense of extortion without the
20 requirement that there be an affirmative claim for extortion.
21 I think this is analogous to that.

22 THE COURT: Okay.

23 MR. EDLIN: Thank you, Your Honor.

24 THE COURT: Thank you, very much, sir. Counsel, you
25 may proceed.

1 MR. BAILUS: Morning, Your Honor.

2 THE COURT: Good morning.

3 MR. BAILUS: I have a Power Point presentation that
4 I'm going to use, as an option as a exhibits.

5 THE COURT: And I understand we're pretty much going
6 to have to depend on the big screens; correct? We weren't able
7 to --

8 MR. BAILUS: We can help you.

9 THE COURT: We can tilt these so everybody can see
10 them.

11 THE COURT: I can see this one fine.

12 MS. FINKELSTEIN: I can see -- I can see this is
13 okay.

14 MR. BAILUS: All right.

15 THE COURT: I don't know if the gallery wants to see
16 them. We might even be able to -- I can see mine fine.

17 MR. EDLIN: It seems to be working.

18 MR. BAILUS: Well, I'm going to address the slides
19 later on so I'll just get -- I'm Blake Bailus, of the law firm
20 Greenberg Traurig and I'm here to argue on behalf of the
21 plaintiffs. First, I'd like to thank Your Honor for giving us
22 an opportunity to address the issues raised in the defendant's
23 motion to dismiss.

24 I want to focus specifically on whether the
25 plaintiffs, under applicable state law have pled all five of

1 their FTCA claims. The parties agree that with regards to Mr.
2 Q. and E.A.Q.A. that Texas law should apply to all five of
3 those claims. The parties also agree that with regards to Mr.
4 A.'s and C.D.A.'s loss consortium in a Visa process claims that
5 New Mexico law should apply. There is disagreement, however,
6 as to whether New Mexico or Pennsylvania law should apply to
7 those claims of Mr. A. and C.D.A. that occurred in both of
8 those states.

9 Under Simon vs. United States, the choice of law
10 rules applicable to these multi-state torts depends on the
11 jurisdiction containing the last significant negligent act or
12 omission relevant to the FTCA. That last significant negligent
13 act occurred at the Berks County Residential Center in
14 Pennsylvania. Thus, Pennsylvania choice of law rules should
15 apply to those three claims.

16 As I'm sure you're aware, Pennsylvania choice of law
17 rules first inquire into whether there's an actual conflict
18 between the foreign law, Pennsylvania law and any competing
19 states' laws. There's an actual conflict where there are
20 relevant differences between the laws. Meaning, a plaintiff's
21 recovery would be limited or barred in one state, but not the
22 other.

23 And that can't be said for those three claims in Mr.
24 A. and C.D.A.. They should be allowed to fully proceed under
25 either New Mexico or Pennsylvania law. And thus, Pennsylvania

1 substantive law should apply to those three claims. I want to
2 --

3 THE COURT: And why is that important to you? Is it
4 important to you? In other words are there any -- a variance
5 between the two? Is it to emphasize why the case should stay
6 here? What are the different factors that make that important,
7 other than we want to get it right?

8 MR. BAILUS: I would say that's the primary concern,
9 is I want to make sure the correct law is applied to those
10 claims. But I don't want to say it's irrelevant but they
11 should be able to fully recover under Pennsylvania or New
12 Mexico law. So it's really just about getting the right law
13 applied to those three claims.

14 THE COURT: Okay.

15 MR. BAILUS: And I want to briefly address an
16 argument that the government makes only in its moving papers.
17 I don't think they address it here, at argument today, that
18 their conduct is privileged with regards to only Mr. Q. and
19 E.A.Q.A.

20 The defendant has failed to explain how Texas law or
21 AUC 1325, 1326 or 1232(b) provides them the permission that
22 they seek for conduct that includes violating the US
23 constitution. It violated it. And the federal courts found
24 this, that it violated the plaintiffs' substantive due process
25 rights. Their -- their liberty interest, their fundamental

1 right to family integrity.

2 This is the comment that my colleague, Mr. Edlin,
3 already noted constitutes torture. The US government
4 intentionally and nefariously sep -- separated young children
5 from their parents and they needlessly prolonged that
6 separation even in defiance of court ordered injunctions for
7 five to seven weeks. And this inflicted severe psychological
8 trauma on each of the plaintiffs.

9 Under Texas law to successfully invoke some sort of
10 privilege, some statutory privilege there must be an
11 identification of a specific statute, usually in Texas' penal
12 code. The defendant has failed to make any attempt at doing
13 that. There is no blanket or general law enforcement privilege
14 that exists under Texas law. And further, before a finding of
15 privilege is actually successful there's always some -- some
16 inquiry by the courts, and there's a reasonability of the
17 defendant's conduct. As alleged the defendant's conduct here
18 is wholly unreasonable.

19 And I want to turn next to the discussion of the --
20 the elements for each of the five claims. But before I discuss
21 individually those five claims I want to discuss an argument
22 that the government makes with regards to, I believe three of
23 those torts, although I have a physical injury requirement for
24 four of them up here. Because one is under Pennsylvania law.

25 But what they argue is that there's some sort of a

1 physical injury requirement and we disagree on the extent of
2 that physical injury requirement. But there's some physical
3 injury requirement for several of these torts under Texas, New
4 Mexico and Pennsylvania law. And what they argue is that the
5 plaintiffs have insufficiently pled physical injury. For
6 intentional infliction of emotional distress, the defendant's -
7 - the defendant's outrageous conduct must result in severe
8 emotional distress accompanied by physical injury a quote,
9 physical injury under Pennsylvania law.

10 For negligent infliction of emotional distress, I
11 want to make a point as to Texas law, the government correctly
12 notes that negligent infliction is not independent recognized
13 tort under Texas law. However, Texas does allow for bystander
14 recovery. And the exact same circumstances that you can --
15 that you can recover in New Mexico and Pennsylvania. And when
16 recovering under Texas law for bystander liability there is no
17 need to show any physical liability. And you could see that in
18 one of the cases the defendant cites in its moving papers, City
19 of Tyler vs. Likes, an SCI funeral -- an SCI Texas Funeral
20 Services vs. Nelson and the Chapo decision which they reference
21 later in their notes of argument.

22 The only physical injury requirement for a negligent
23 infliction is for New Mexico law where the victim -- that
24 observation of a traumatic injury producing event, that event
25 was caused a quote, physical injury to the victim. This is not

1 serious physical injury but a physical injury. That is the
2 standard.

3 The defendant next argues that categorically there's
4 a physical injury requirement for Texas and New Mexico law to
5 recover on negligence. However, the cases that they cite such
6 as the Temple and Lynne case specifically note it observes that
7 you can recover for neg -- and negligence what -- depending on
8 the quality of the proof offered and the nature of the duty
9 breached. And under New Mexico law where the plaintiff has
10 pled severe distress there's no requirement to show physical
11 injury contrary to what the go -- what the government argues.

12 The loss of physical injury requirement is for loss
13 of consortium and that exists under New Mexico and Texas law.
14 And the Rodriguez case that they quote in their reply -- or
15 that they cite you in the reply, the only requirement of an
16 injury was a quote, physical injury although other cases in
17 Texas have noted that there needs to be a severe or disabling
18 injury, such as the Regan -- in the Regan vs. Law decision
19 which the government cites in its motion to dismiss.

20 And under New Mexico law there only needs to be a
21 showing that the victims suffered from a wrongful, or a
22 physical injury. So for many of those torts that standard is a
23 quote, physical injury. What the government -- not serious
24 physical injury as the government asserts.

25 The government next argues that the plaintiffs here

1 have insufficiently pled physical injury. And in fact, for one
2 of these torts they have even required that we submit
3 corroborating medical evidence. This is not a hearing on a
4 summary judgement motion. This is a motion to -- this is a
5 facial attack on subject matter jurisdiction a 12(b)(6) motion
6 to dismiss. Assuming the allegations are true and affording
7 the plaintiffs every reasonable inference, there must be just
8 enough factual matter to plausibly plead a claim. And that's
9 the Tauble and Ikval standards.

10 And I've included here just a list of all the
11 instances. It's not on the Power Point, but all the instances
12 in which the plaintiffs have plead physical injury, physical
13 trauma, physical distress. For instance, paragraphs 60 and 61
14 of the amended complaint allege that plaintiff fathers of
15 plaintiff sons suffered physically as a result of that
16 forceable separation. I could go through the list but I think
17 there's 14 instances where that phrase physical -- something
18 like physical injury is alleged.

19 That should suffice under this pleading standard.
20 Further we cite to numerous medical organizations in -- that
21 appear in scientific publications that document the exact sort
22 of physiological changes that will result in somebody who
23 endures this forceable family separation.

24 THE COURT: I was going to ask you, just what is the
25 physical injury? It's one thing to say -- to say they suffered

1 physical injury.

2 MR. BAILUS: Sure.

3 THE COURT: But what is the physical injury that they
4 suffered?

5 MR. BAILUS: Well, I have two points to that. And
6 the first, I want to discuss the direct physiological injury,
7 the physical injury that people like the plaintiffs, who endure
8 this family separation will suffer. And it's well documented
9 by -- by scientific journals, cited in the -- the amended
10 complaint. This includes a dysregulation of hormones in the
11 body, and that's from the American Academy of Pediatrics. It
12 includes detectful physiological changes to the brain
13 architecture.

14 It -- it's -- it's a change in the body that pure --
15 that someone suffering from a pure emotional distress where you
16 can't detect in somebody's suffering just pure emotional
17 distress. These are direct changes, adverse changes in the
18 body. And I have another point to make with regards to this
19 showing of physical injury, authority in Texas, New Mexico and
20 Pennsylvania have all held in a variety of circumstances that
21 physical manifestations of -- of emotional distress qualify as
22 a physical or bodily injury.

23 And even this court, the Eastern District of
24 Pennsylvania has held, and I just want to read the language,
25 and this is in Edmonton vs The Buckstop Incorporated. It held

1 -- this court held that physical injury includes physical
2 manifestations of emotional distress. And courts in New Mexico
3 have come to that exact same conclusion as well. And regarding
4 Texas I want to read another case. It's a landmark Texas
5 Supreme Court decision that's often quoted in these common law
6 tort cases. And this is from Hill vs Kimble where the Texas
7 Supreme Court stated a physical personal injury may be reduced
8 through a strong emotion of a line, there can be no doubt.

9 And that's exactly what we can see with the
10 plaintiffs here that this is severe psychological trauma
11 transgressed into a physical -- physical injury. So I would
12 argue as to there's some showing more than just pleading of
13 physical trauma that was needed. I would say we make two
14 points as to that. That -- the scientific publications that we
15 cite you show a document, the physiological changes that
16 resulted in the forceable separation.

17 And further, there's this line of authority in all
18 three states that have explicitly stated that physical
19 manifestations qualify as a physical injury.

20 Now, I want to move on to the -- to the next slide,
21 which is on intentional infliction of emotional distress. And
22 I'll -- the left-hand side those are the elements for that
23 claim. A defendant's conduct must be extreme and outrageous
24 that the defendant was to have acted intentionally or at least
25 recklessly. And as a result defense called it, that act must

1 have caused severe emotional distress.

2 What the defendant argues here is that they've merely
3 carried out federal immigration law. They call this lawful
4 action, despite the fact that there's been court rulings that
5 this has been patently unlawful. They -- they -- they claim
6 that what has happened here does not rise to extreme and
7 outrageous behavior. And that it is rather ordinary. All
8 they've done is carried out the law. However, the courts in
9 the Ms. L litigation and W.S.R. vs. Sessions, have both noted,
10 both observed that this family separation policy shocks the
11 contemporary conscience.

12 As seen on the Power Point slides by my colleague Mr.
13 Edlin, even -- even the president remarked that this family
14 separation policy is outrageous. It's been held in -- in the
15 Ms. L litigation which included as a class the plaintiffs here
16 and in W.S.R. vs. Sessions which included C.D.A., that those
17 plaintiffs have suffered irreparable injury as -- as a result
18 of the family separation policy. In fact, Judge Shenk of the
19 Northern District of Illinois in the W.S.R. vs. Sessions case
20 noted that this has caused extreme irreparable injury to W.S.R.
21 and C.D.A.

22 What the government has done here constitutes
23 torture. They've ripped apart families and they kept those
24 families separated, hoping all in the effort that this would
25 cause the plaintiffs to forfeit, to relinquish the rightful

1 asylum claims. This is extreme and outrageous behavior
2 that should not be tolerated in a civilized society.

3 I want to move on next to the -- the third slide and
4 that's on negligent infliction of emotional distress. So
5 ignore my misspelling in that -- that first point. What was --
6 the elements on a negligent infliction claim are that the
7 plaintiff was near the scene of an accident or a negligent act
8 or event that shock or distress resulted from that direct
9 emotional impact caused by the observance of the event, as
10 opposed to learning of it after the fact.

11 And finally, the plaintiffs closely related to the
12 injured victim. This tort can be summarized as the observance
13 of some traumatic injury producing event resulting in a direct
14 emotional impact, and that is exactly what the plaintiffs have
15 alleged here. As a result of experiencing -- actually, first
16 hand experiencing that physical -- physical and forceable
17 separation where they were ripped apart from one another and
18 the observance of that event, each of the plaintiffs has
19 suffered severe psychological trauma that they continue to
20 suffer from to this -- to this current day.

21 And this may not be a -- like many afflictions claims
22 where you mentioned somebody's hit by -- by a truck, but it
23 still fits within each of those elements. And that claim
24 should be allowed to proceed. And as I already noted when I
25 discussed physical injury, contrary to what the defendant

1 argues, Texas does recognize bystander recovery in the exact
2 same scenarios that New Mexico and Pennsylvania law does as
3 well.

4 And I want to move on next to the third slide on
5 negligence. So the -- the elements of negligence are the
6 existence of a legal duty here at a minimum, the duty to act
7 with reasonable care owed to the plaintiffs that there be some
8 breach of that duty. And that as a result of the breach --
9 that breach causes the plaintiffs' injury and the plaintiffs'
10 damages.

11 What the government has argued here and it's similar
12 to what they argued for intentional infliction is that merely
13 pleading that you've been detained or merely pleading that you
14 been prosecuted cannot amount to a breach of that duty of
15 ordinary care or of the plaintiffs' allegations center on how
16 they were prosecuted and how they were detained. And I want to
17 make a -- a technical point with regards to Tex -- Texas law.
18 The plain -- setting aside the fact that we have alleged
19 physical injury under Texas law a plaintiff can recover mental
20 anguish damages and negligence where -- well, there's at least
21 two circumstances. Where there's a special relationship
22 between the plaintiff and the defendant or where the defendant
23 has acted with intent or malice.

24 I've already gone through the defendant's nefarious
25 intent here, that this was the cautious objective of the family

1 separation policy to cause exactly this sort of harm that the
2 plaintiffs have suffered from. And the plaintiff -- the
3 plaintiffs here and the defendant, the US government said to
4 have at least two special relationships recognized under Texas
5 law. In Salazar vs. Collins the Texas court of appeals found
6 that there was a jailor/inmate relationship that imposed on the
7 jailor a special duty, a heightened duty to take reasonable
8 steps to prevent harm to those inmates.

9 And that in another case Applebaum vs. Neman the
10 Texas court of appeals also recognized another special duty
11 which -- which can be summarized as a sort of transfer of duty
12 from a responsible parent to some sort of child care facility
13 when that facility takes on custody of that child. And that
14 duty is similar to the duty of reasonable care. It must take
15 care of that child that it's entrusted with. The defendant was
16 not taking care of plaintiff children here. In fact, they've
17 intentionally caused harm to both of those children.

18 I want to move on next to the fourth claim and that's
19 abuse of process. Abuse of process as the government's already
20 noted is some misuse of a judiciary by a litigant with some
21 malicious, improper, perverse motive and I want to go through
22 the two elements that I've bo -- that I've laid on the left-
23 hand side here. The defendant -- as I've already stated the
24 defendant made an illegal, improper or perverted use of the
25 process motivated by malicious motive and that damages must

1 result to the plaintiff as a result of that abuse of process.

2 The government's argument here really only focus --
3 focuses on that -- that last element of damages traceable
4 through the abuse of process. But I want to take a step back
5 and -- and note as to this first element that what the
6 government has done here is they've abused their charging
7 power, their power to prosecute to artificially designate
8 E.A.Q.A. and C.D.A. unaccompanied minors, despite the fact that
9 they both came to the border with -- with their fathers. And
10 that this -- this designation gave them that pretext that
11 opportunity to separate the plaintiff children from their
12 fathers, which you know, caused all the harm that the
13 plaintiffs have suffered from.

14 And that really goes to that second element that the
15 damages be traceable to that abuse of process. And they argue
16 that because the plaintiffs as having claims have yet to be
17 conclusively denied. There are no damages traceable to that
18 abuse of process. However, all the damages that the plaintiffs
19 have suffered are traceable to that initial indictment, to that
20 prosecution of plaintiff fathers under AUSA 1325 and 1326.
21 That's -- that's in a motion, a chain of events that allowed
22 plaintiff fathers and plaintiff sons to be separated where they
23 were -- where the government prolonged that separation knowing
24 that with each day the trauma would compound and worsen. These
25 are the damages traceable to the abuse of process.

1 And I want to move on now to the --

2 THE COURT: And you're not alleging abuse of process
3 with respect to the individual that was convicted?

4 MR. BAILUS: Sorry, can you repeat that question?

5 THE COURT: You -- you are not alleging abuse of
6 process with respect to the victim -- with the plaintiff that
7 was convicted?

8 MR. BAILUS: I -- I am because that abuse of process
9 did not result from the conviction. It resulted from that
10 initial indictment which gave the government the opportunity to
11 separate plaintiff fathers and plaintiff sons. It's not the
12 convic -- the conviction here, or any resulting conviction that
13 would happen isn't what resulted in the harm to the plaintiffs.
14 It was this policy by the government to charge everybody who
15 crossed that southern border with some sort of -- with some
16 sort of federal immigration statute which gave them that
17 pretext, that opportunity to separate families.

18 THE COURT: Does it matter if they were guilty or
19 not?

20 MR. BAILUS: It shouldn't matter because what -- what
21 matters here is the motive behind that -- that use of the
22 prosecutor -- prosecutorial power. The fact that they are
23 convicted isn't what resulted in their separation. That was --

24 THE COURT: And what if the purpose of the statute is
25 to deter illegal immigration? Is that abuse of process if they

1 would prosecute everybody that comes across the border if their
2 goal was not to avoid these asylum applications, but was
3 instead intended to deter, in general a deterrence of others
4 from violating the law?

5 MR. BAILUS: I think the government can implement
6 federal immigration law to deter migration. However, they
7 can't do those -- do that with regards to people who are
8 fleeing countries in terror and have colorable or rightful
9 asylum claims. What the government alleges here is that they
10 are doing this to protect national security. But it's really -
11 - they're -- they're motivated out of this hostility to
12 persons, towards the plaintiffs.

13 What abuse of process gets to is the motive behind
14 the abuse of that power. So I think there are circumstances in
15 which the government could use AUSC 1325 and 1326 to deter
16 future migration, but the manner in which they did it here is
17 malicious. It was with no proper motive. And because of that
18 the plaintiffs should be able to recover for abuse of process.

19 THE COURT: Okay.

20 MR. BAILUS: And I want to move on to the -- the
21 final thing loss of consortium. As I noted there's different
22 physical injury requires for Texas and New Mexico, but that --
23 that sort of claim can be summarized as where the defendants
24 caused the wrongful or physical, or under Texas, disabling
25 injury or death of someone who was in a close relationship to

1 the plaintiff resulting in harm to that relationship. And here
2 the plaintiffs have suffered as alleged severe, permanent and
3 disabling injuries. And because of that they must not contend
4 with the long-term health effects and emotional trauma caused
5 by federal officers implementing the family separation policy.

6 This -- this -- this family separation policy has
7 resulted in such severe psychological trauma that it has led to
8 a loss of that companionship, that benefit of a familial
9 relationship. That is something that the plaintiff --

10 THE COURT: And this -- the argument is it goes both
11 ways that the child lost the consortium of the father and the
12 father lost the consortium of the child or does it just go one
13 way?

14 MR. BAILUS: I would argue that it goes both ways.
15 They both suffered. It's been alleged that they both have
16 suffered severe psychological trauma that interferes with their
17 ability, that -- their capacity to care for one another, to
18 offer that companionship. This is severe psychological trauma
19 that the plaintiffs are dealing with and continue to deal with.

20 Some of the -- the diagnoses that have been made for
21 the plaintiffs include severe anxiety, post-traumatic stress
22 disorder, depression and this has interfered substantially with
23 their ability to provide consortium, companionship. The
24 government argues here under Texas law that there must be
25 actual recovery for the torts that resulted in that injury to

1 that close relative. But as I've argued, the plaintiffs should
2 be able to proceed under all those other torts that resulted in
3 harm to that injured -- to that close relative. That's
4 intentional and negligent infliction of emotional distress and
5 negligence.

6 So there is actual -- there should be actual recovery
7 here that would allow their claims to proceed under Texas law.
8 And finally, they argue that to recover under New Mexico law
9 that that injury to the close relative must sound in an
10 intentional act and not negligence. And they quote, or they
11 cite to -- this is Rosebury vs. Starkovich decision for the New
12 Mexico Supreme Court in 1963. Authority has since superseded
13 that -- that Rosebury decision. And there have been several
14 claims, such as the case we cite in our opposition Breneman vs.
15 The Board of Regents of the University of New Mexico that have
16 allowed loss of consortium claims to proceed where that injury
17 to the close relative was a result of negligence. And Your
18 Honor, that's -- that's all I have to say as to regards to what
19 the plaintiffs have pled each of their five FTCA claims. Thank
20 you.

21 THE COURT: Okay. Thank you, very much, sir. Notice
22 as it goes on I ask fewer and fewer questions, so the later you
23 go the luckier you are. But I could make an exception.

24 MR. NORDEN: Good afternoon, Your Honor. My name is
25 --

1 THE COURT: Good afternoon, sir.

2 MR. NORDEN: -- Nicholas Norden. I'm here today to
3 oppose the government's motion to transfer venue and sever. If
4 it's okay with Your Honor, I'd like to start --

5 THE COURT: That's because you like this court --

6 MR. NORDEN: Yeah.

7 THE COURT: -- sitting on this case.

8 MR. EDLIN: Your Honor, we're prepared to stipulate
9 that this court can adjudicate any and all claims equally with
10 the Texas colleagues.

11 THE COURT: Thank you very much, sir.

12 MR. NORDEN: If it's okay with Your Honor, I'd like
13 to actually start off with the transfer because I think that
14 once the transfer 1404(a) question is decided the ruling on
15 severance really becomes academic and when I get to severance,
16 I'll explain that. But I'd just like to start off with
17 pointing out what the government is asking for. They're asking
18 for a 1404(a)-transfer due to convenience. They are not
19 alleging that venue is improper in this district. Ms.
20 Finkelstein, during her presentation admitted that they are not
21 contesting residency and under the FTCA the venue is proper
22 when plaintiffs reside -- under the FTCA venue statute, venue
23 is proper when the plaintiffs reside in a district.

24 THE COURT: Right because the United States resides
25 everywhere.

1 MR. NORDEN: Well, that's my point. That's what I'm
2 getting to, so how can the US government credibly argue that
3 it's being inconvenienced by litigating in this district? Now,
4 I don't think it can. I think that what's really going on here
5 is my colleagues have laid out this substantive abuse and
6 mistreatment that my clients have received at the hand of the
7 government and I feel this is a kind of procedural mistreatment
8 because effectively, if the government gets the relief, it's
9 seeking here and gets a venue transfer our clients are going to
10 be deprived of their day in court.

11 And I wanted to -- so I think this question of
12 convenience could really settle the issue.

13 THE COURT: Well, wouldn't it be direct -- if you're
14 going to depose -- I don't know what the discovery schedule
15 might look like.

16 MR. NORDEN: Right.

17 THE COURT: Or the discovery plan. But I assume you
18 want to depose the people that -- that did the wrongful acts.
19 They're all down in Texas and New Mexico, with the exception of
20 that very small part of the case with respect to, I think,
21 C.D.A. that occurred in the residential facility. But all the
22 other acts occurred down in the south western part of the
23 country.

24 MR. NORDEN: Right.

25 THE COURT: How do you possibly do discovery?

1 Everybody got to travel down there, constantly.

2 MR. NORDEN: Well, I'm not disputing that the acts
3 occurred in New Mexico and Texas, but I will say that the
4 plaintiffs are here. They're -- the treatment and consulting
5 they've received happened in this district, so I think there
6 are relevant districts here and I think if you go to the Jumara
7 factors, the government bears a burden on this motion. And
8 they have not identified a single witness who would be
9 unavailable for trial, which is the standard. So -- and they
10 have the burden. So I -- I really think that -- I would like
11 to get into the Jumara factors next.

12 We agree with the government that these factors are
13 what's relevant. We just disagree in whether or not they favor
14 transfer or not. So the first factor is plaintiffs' choice of
15 forum. This has been described as paramount. It should not be
16 lightly disturbed. And here it's obvious, this is plaintiffs'
17 choice of forum. And both, I think, the Third Circuit and the
18 Supreme Court have ruled that the plaintiffs' choice of forum
19 is even heightened when the plaintiff resides there. So this
20 factor, which is often described as the most important factor
21 weighs heavily against transfer.

22 The second factor is defendant's choice of forum.
23 Now, this factor is given little weight for a kind of logical
24 reason that there wouldn't be any dispute over the venue if the
25 defendant wanted to be here. So courts will concede that the

1 government seeks the transfer for convenience but this factor
2 is not given much weight in the analysis.

3 The third factor is where the claims arose. And
4 there's been much discussion about this. And we will concede
5 that many claims have arisen in New Mexico and Texas. But we
6 don't -- also do not think that the claims related to the Berks
7 are insignificant. Events happened there and I also wanted to
8 draw the courts attention to a case Wilbur P.G. it was in the
9 Northern District of California. And it was another border
10 separation case where a -- a motion to transfer was denied and
11 in this factor the courts considered the ongoing trauma and
12 pain to plaintiffs after they arrived in the district as part
13 of the analysis related to where the claims arose under this
14 factor.

15 So I think in light of the fact that claims did arise
16 in this district and this factor that the Wilbur P.G. point
17 courted out, this factor does not support a transfer either.

18 Now, the fourth factor is convenience of the parties.
19 And the government in their presentation said the only factor
20 that favored plaintiffs was the choice of home forum. I just
21 cannot -- I don't know how they can credibly argue that the
22 convenience of the parties favors them here. Look, the
23 plaintiffs are here. They want to be here for this case and
24 see the case through. And, you know, courts have ruled even --
25 the government can't show inconvenience, but even if they could

1 the courts have ruled that you don't transfer when you merely
2 shift the inconvenience from one party to the other. So this
3 factor does not favor transfer either.

4 The next of these -- the -- the Jumara private
5 factors is the convenience of witnesses. Now, again, under
6 Third Circuit precedent, this factor is only relevant if
7 witnesses are going to be unable for trial. And the government
8 has not identified witnesses, let alone stated which ones are
9 going to be available for trial and which ones aren't. You
10 know, in our briefing, we cited -- sorry, we cited a case
11 called Superior Pretext where the -- the entity seeking
12 transfer was Safeco and the court that this factor did not
13 favor transfer because while Safeco provided a list of
14 witnesses, they didn't identify how their testimony would be
15 material to the case. So here we don't even have a list of
16 witnesses. The government has not met its burden under this
17 factor.

18 Okay. So the final of the private factors is the
19 location of books and records. And I think that most courts
20 are now basically unanimous that this factor in this age of e-
21 discovery and el -- el -- electronicization of everything is
22 not really relevant. In our -- in our briefing we cited the
23 Coppola case where it stated, from the Eastern District of
24 Pennsylvania, which stated as recognized by other decisions the
25 technocological -- technological advances of recent years have

1 significantly reduced the weight of this factor in the balance
2 of convenience analysis. So those are the private factors. We
3 do not believe that really any of them support transfer.

4 Now, the public factors, I want to -- before just
5 getting into this part of it, there was a recent border
6 separation case decided after the briefing was completed in
7 this case. It's E.L.A. vs. United States. And the court
8 determined in its analysis that it would not be in the interest
9 of justice to transfer this case to a forum wherein plaintiffs
10 would be unable to litigate. So I think that's a key public
11 interest analysis, because we want claimants who have been
12 wronged by this policy to come forward and liberally granting
13 transfer to far flung locations would not serve that goal.

14 Now, the other public interest factors that courts
15 look to do not support transfer. There -- there tend to be
16 mostly neutral, I think, you know, to look to court congestion.
17 I looked at the docket stats of this district versus the
18 Western District of Texas and the District of New Mexico, I'm
19 not seeing significant difference. I noted the Western
20 District of Texas has a judicial emergency while the other two
21 districts didn't. The median time from filing from trial I did
22 not notice any significant difference. So I do not believe
23 that factor supports transfer.

24 It does not -- I do not see any reason why a judgment
25 against the government would be more difficult to enforce in

1 one district over the other. You know, the choice of law, the
2 Supreme Court has ruled that federal courts are capable of
3 applying the laws of other dis -- other states.

4 THE COURT: Sure, but you can't jump over that one.

5 MR. NORDEN: Yeah.

6 THE COURT: Because these are novel issues of state
7 law.

8 MR. NORDEN: Right.

9 THE COURT: To ultimately, prob -- I would expect
10 determine by the Texas Supreme Court and the New Mexico Supreme
11 Court, they are not the run of the mill interpreting negligence
12 statutes, run of the mill interpreting the various elements of
13 the -- of the offenses. They will involve, even though courts
14 have nothing to do with policy decisions they will involve
15 issues that very much reflect on the policy of the courts at
16 least as they have applied these -- these statutes.

17 I'm assuming that the Texas Supreme Court and the New
18 Mexico Supreme Court have not rendered any precedent that we
19 can rely on in trying to determine how they would answer these
20 novel issues. So that puts me in the position of having to
21 answer novel issues of state law when I could transfer it and
22 have it determined by the -- the courts of that respective
23 state. Why wouldn't I do it based on that public factor alone?

24 MR. NORDEN: Well --

25 THE COURT: I mean, obviously, doing all the

1 balancing, but why wouldn't that be a very powerful factor to
2 consider.

3 MR. NORDEN: I think the issue is the -- well, the --
4 the application is novel. I don't -- as my colleague laid out
5 in his presentation the -- the elements of these claims
6 throughout the jurisdictions are very similar and I don't think
7 the application would differ significantly between the
8 respective districts.

9 THE COURT: I wonder, what do you think about Texas?
10 I don't know too much about New Mexico, but I know Texas tends
11 to -- their law is -- the words look the same and yet the
12 outcome seems often times different. And the question is how
13 is that possible? Texas seems to have its own view of the law,
14 as do all of the states, but in this particular case if I
15 looked at how Pennsylvania looks to physical injury and loss of
16 consortium and when it applies and when it doesn't apply, you
17 don't think that the -- the law of Texas is unique? And I
18 should say every law -- every state has unique aspects to its
19 law and yet at the same time in all fairness to litigants
20 throughout each of the individual states there's a lot of
21 uniformity.

22 MR. NORDEN: Yeah.

23 THE COURT: As we were addressing here today, there's
24 a lot of uniformity with respect to the elements required and
25 the interpretation of those elements. But you -- you don't

1 think this is -- the issues are novel enough that there would
2 be a great benefit to both plaintiff -- plaintiffs and the
3 defendant to them being resolved through the courts of the
4 state of where they're all applicable?

5 MR. NORDEN: Your Honor, I think that while the
6 issues involved may be novel, the application of the elements
7 is not -- is not novel and is not significantly different
8 between the states. And I believe if there was a significant -
9 - if it was considered a significant issue a first impression
10 that certification to the state's supreme court would be
11 required in any event whether this was in a federal court in
12 Texas or in New Mexico. But -- so but I -- I again, listening
13 to the elements that I believe that the application is straight
14 forward and it is the supreme court's view that federal courts
15 are capable of applying the laws of other states rather
16 routinely.

17 THE COURT: And you believe I'm capable.

18 MR. NORDEN: Oh, of course, Your Honor. Okay. So
19 that's the motion to transfer. So we think the transfers have
20 -- the factors to apply indicate that transfer is not
21 warranted. So now we have the government's motion to sever,
22 which they spent a lot of time on it and led with. But I think
23 it's an academic question because the standard for severance
24 under FRCP 20 and 21 is nothing to do with transfer.

25 So the key decision of where these -- where these

1 cases are going to go is all tied up in the fourth -- in the
2 venue transfer analysis. So leaving that aside, if you're --
3 if Your Honor is persuaded by the severance arguments you could
4 just have two cases here, but --

5 THE COURT: Or one case here and one case --

6 MR. NORDEN: Right. If you -- if you -- if you found
7 transfer was more warranted for one of the two, but based on
8 the analysis of the transfer factors for both sets of
9 plaintiffs it's not warranted. But we think that -- we don't
10 think in any event that severance is appropriate because courts
11 have found now the standard of same transaction or occurrence,
12 but courts have found that a systematic pattern between
13 torturer -- torturous events will satisfy the series of
14 transactions or occurrences problem. And that's exactly what
15 we have here.

16 All of these border separation cases, while distinct
17 cases with their own distinct facts all occurred pursuant to a
18 systematic policy. So that does not mean we are systematic
19 claims per say, but they all were rendered through the same
20 policy. In -- in -- in its opening brief the government
21 actually supplied -- cited a case in support of its severance
22 argument and it's the Killmaski case. It's on page 54 of their
23 opening brief. In that case the government severed multiple
24 claims of workplace discrimination, but noted that joinder had
25 been held appropriate where a logical relationship has been

1 found to exist between the claims of multiple plaintiffs who
2 allege that they were discharged pursuant to a central company
3 wide policy of discrimination. So I think that's what we have
4 here and I think why severance would not be appropriate, but I
5 do think that the most important question, if Your Honor, in
6 managing -- if this is all in your discretion, in Your Honor's
7 discretion, so if Your Honor found it appropriate, we think
8 that for now the cases should be consolidated, but if enough
9 distinct issues emerge at the time of trial where severance
10 might be more appropriate then I think that issue can be
11 discussed then. But for now, for purposes of case -- case
12 efficiency we do not think that severance is warranted.

13 THE COURT: Well, severance at time of trial would be
14 more if I felt there was going to be a spill over effect, but I
15 don't know that there's much of a spill over effect here that
16 would prejudice the defendant. The -- the better issue is
17 there are similar issues of fact. There are certainly similar
18 issues of law. Although, then all of the sudden we're applying
19 two different states' laws. Although, I also understand that
20 your argument is that Pennsylvania law may apply with respect
21 to the -- the one where there was some issues down in Reading.

22 So the -- it's -- it's really a contest pretty much,
23 we've got similar issues of law, similar issues of fact, it's
24 all addressed under these police of separating the parents and
25 children at the border. And so the natural question becomes

1 how many more plaintiffs could you have joined to this? Could
2 you have joined -- I had a case that went to trial with I think
3 12 dryer fires.

4 MR. NORDEN: Yeah.

5 THE COURT: And obviously they wanted them -- and I
6 tried them all together in front of one jury. And there was
7 the issue of spill over, but the -- the evidence would have
8 come in anyway, the damages weren't that hard.

9 MR. NORDEN: Right.

10 THE COURT: Here's how much damages caused from this
11 fire -- but here there are so many potential difficulties at
12 trial that need to be addressed before trial. I don't know
13 that just waiting until trial to sever would make sense and I
14 don't know whether they would even need to be severed for trial
15 or whether they could be tried together. But it does seem
16 strange that I would take two cases dealing with two separate
17 parties unrelated to each other, dealing with two separate
18 types of law, two -- two different state laws and try them in
19 the same trial and have them proceed through discovery.

20 I mean, most of the discovery is even going to be
21 completely different because they were separated in different
22 states so they have to be different federal actors involved.
23 The paperwork has to be held in different places. Everything
24 about discovery is going to be separate. It's not like they
25 even came through the same processing location, et cetera.

1 There's nothing about these two cases that's related at all
2 except that the father and son were separated because of a
3 policy. Doesn't that concern you?

4 MR. NORDEN: Well, one I would just hope that the
5 severance analysis doesn't get subsumed in the transfer
6 analysis, but I made that point already. And I -- I think that
7 -- that's why I call it kind of an academic point. But I think
8 I'm looking at the Chrube, C-H-R-U-B-E, case that we cite where
9 the court found that the alleged misconduct of various
10 defendants in three different institutions, but all concerned
11 similar and related breaches of the housing and medical
12 protocols provided by the settlement agreement. So that last
13 part that's different factual, but the idea was conduct across
14 three different institutions, but related to, you know, similar
15 breach of like a systemic policy.

16 THE COURT: Right.

17 MR. NORDEN: And the -- the court found that joinder
18 was helpful to it and so that's why --

19 THE COURT: Oh on -- on the legal issues I actually -
20 - I absolutely agree with you.

21 MR. NORDEN: Yeah, yeah.

22 THE COURT: On the legal issues involving these two
23 cases joinder makes perfect sense to address them.

24 MR. NORDEN: Right and the Russell court found
25 discussing this issue of should severance occur before trial

1 they found that the gov -- the defendant would not have any
2 prejudice unless severance wasn't granted prior to trial. So
3 that's -- we think that that's important to this analysis too.
4 And that's all I have.

5 THE COURT: Okay. Thank you very much, sir.

6 MR. EDLIN: Your Honor, just one brief comment if I
7 may?

8 THE COURT: Certainly, sir.

9 MR. EDLIN: It goes to your point about the novelty
10 of the laws. I've had the opportunity to do quite a bit of
11 work down in Texas, Delaware and many other jurisdictions. I
12 would absolutely agree that the procedures are quite different,
13 but the substance of the law here is quite similar and -- and
14 my experience has been that the laws of the states are much
15 more similar than they are not.

16 I think you see in the two cases that we've talked
17 about, the Southern District of California case, Northern
18 District of Illinois case, one might say a very liberal state,
19 one might say a much more conservative state on legal issues
20 and what happened. Courts came out identically. I think we
21 would see that here too.

22 THE COURT: In the common law the restatement helps
23 with that as well. And each individual state's adoption of the
24 restatement so --

25 MR. EDLIN: Thank you, Your Honor.

1 THE COURT: Thank you, sir. Who's next up?

2 MS. REDDY: Good afternoon, Your Honor.

3 THE COURT: Good afternoon, Counselor.

4 MS. REDDY: I will be using a Power Point as well if
5 -- if that is all right. Good afternoon again, may it please
6 the court, my name is Anne Reddy. I am also a Greenberg
7 Traurig here today on behalf of plaintiffs who are all here
8 sitting behind you in the courtroom, on their summer break.

9 And I'm here to ar -- to ar -- to address the
10 sufficiency of the claims under the alien tort statute, which
11 is, as you know, 28 USC 1350. Now, defendant argues two bases
12 for dismissal of plaintiffs ATS claims which plead violations
13 of Jus cogens norms, norms of international law. First, they
14 argue that they're immune from such claims. An argument as
15 noted that they raised for the first time in their reply brief.
16 And second, they argue that plaintiffs have now identified a
17 norm that defendant violated. Or in other words, a claim --
18 they claim plaintiffs haven't pleaded conduct that's bad enough
19 to constitute torture or the other crimes that are recognized
20 under Jus cogens norms.

21 Now, I will turn, if you don't mind to the second
22 argument first and discuss the norms and the claims of the
23 elements of the torture claims. So under the ATS jurisdiction
24 will vest upon the plaintiffs' plausible allegations of a
25 violation of an international norm, principle of Juice Cogen,

1 that is specific, universal and obligatory. Now, Jus cogens
2 norms are mandatory or preemptory norms of international law
3 except as recognized by the international community, but very
4 importantly these are norms that are recognized as -- which no
5 derogation is -- is permitted in any circumstance. So the
6 prohibition against torture is recognized as one of these
7 norms, the Supreme Court has held that the prohibition against
8 torture is sufficiently specific, universal and obligatory and
9 likewise, cruel, inhuman or degrading treatment and crimes
10 against humanity are so recognized under these Jus cogens
11 norms.

12 Now, the United States has recognized the right to be
13 free from torture and cruel and inhumane treatment in ratifying
14 the convention against torture, the CAT, or C-A-T, and it's
15 implements of legislation which it ratified in 1994 enacted it
16 as a note to the ATS. And in ratifying the international civil
17 and political rights with regard to cruel and inhumane,
18 degrading treatment. So under the CAT torture is defined as
19 any act by which severe pain or suffering, whether physical or
20 mental, is intentionally inflicted upon a person for such
21 purposes as intimidating or coercing him or her or a third
22 person, or for any reason based on discrimination at the
23 instigation or with the consent of a public official or other
24 person acting in an official capacity.

25 Now, here defendant concedes that plaintiffs meet

1 elements 2 through 4. It does not dispute that the zero-
2 tolerance policy and the offshoot family separation policy and
3 its conduct in implementing those policies and in separating
4 young children from their parents at the border was
5 intentional. It also does not dispute that the intent of such
6 separations was to deter migrants, including asylum seekers and
7 to coerce them into forfeiting their legal rights.

8 We have the Attorney General's statement we need to
9 take away the children, hopefully people will get the message,
10 as we have cited to in our -- in our complaint and in our
11 moving -- in our opposing papers. We have Deputy General
12 Rosenstein's statement to the Office of the Inspector General
13 that these policies are intended to create a more effective
14 deterrent. We have John Kelley's statement that this is a
15 technique. Family separation is a technique to deter
16 migration, migration of asylum seekers, not -- not, you know,
17 generally speaking people who have claims for persecution for
18 seeking asylum in the US. There are also internal memos. We
19 saw part of one earlier in Mr. Edlin's presentation where the
20 intent to -- to deter is stated fairly and it's an interagency
21 memo. It precedes the implementation of the policy. This was
22 long the intent and that -- and that's conceded by the
23 government.

24 Nor does defendant dispute that these acts of
25 separation, the other abuses alleged were at the direction of

1 public officials. So that leaves us with severe pain or
2 suffering, physical or mental. Now, the amended complaint
3 alleges young children, 9 and 10 years old were forcibly
4 separated from their parents, the only people they knew in a
5 strange country where they didn't speak the language and they
6 had no idea what was being done to them.

7 It alleges the fathers had no idea where their
8 children were being taken, if they would be safe, if they would
9 be subjected to physical or sexual abuse, if they would ever
10 see their children again. Plaintiffs were not given any
11 information, nothing. They got perhaps a ten-minute warning
12 before the separation was -- was implemented. They weren't
13 given so much as a piece of paper, a receipt you might get if
14 someone takes your keys for safekeeping. They had no idea what
15 was happening to them on either side of the equation.

16 So I would say, put yourself in that situation and
17 many of us have been there in a tiny, tiny capacity at a
18 carnival, I've -- I've lost my child at a carnival for 10
19 minutes and there was all this sheer panic and sheer panic that
20 you're trying to control and you know it's all going to be
21 okay, you're in the United States and you have people there to
22 help you. Okay? None of that was the case for the -- for
23 these plaintiffs. So that sheer panic creates, you know, a
24 feeling of sickness.

25 Now, wake up with that feeling of sickness for five

1 to seven weeks. You -- you as a parent can't ensure the safety
2 of your child.

3 THE COURT: But weren't they relying on the United
4 States to take care of them? In other words, when you come
5 across the border illegally with -- with nothing aren't you
6 relying on the United States? So you're asking the United
7 States to care for you because you can't take care of yourself,
8 not easily in any case. And to take care of your son, because
9 you can't take care of your son. You have no money. You have
10 no food. You have no water. You have no shelter. You're
11 relying on the United States to take care of you. So isn't the
12 United States doing exactly what you would ask them to do as
13 opposed to letting you be out in the desert in Texas or New
14 Mexico or wherever. Like don't we have an obligation to take
15 care of them and isn't that what the father was asking the son
16 to do? Or asking the government to do?

17 MS. REDDY: The United States has obligation to -- to
18 put the child in the circumstances within its best interests.
19 Now, you have a four-year-old child, the only bond and the only
20 language they're speaking is say Portuguese. You know, you
21 have a seven-year-old child, you have an eight- or nine-year-
22 old child and the only person in all reality that's looking out
23 for that child is going to be that parent because they have
24 that bond. And they are going to be watching out for abuses,
25 sexual abuse, these kinds of things. So yes, we -- I think

1 that the parents are, you know, requesting that the government
2 provide essential care, you know, instant formula.

3 THE COURT: There's no argument there was sexual
4 abuse of these two boys.

5 MS. REDDY: There is none, but I'm saying that in
6 terms of torture you're talking about mental. You know, you
7 have a 14, 15-year-old kid, you have a 10- or 11-year-old
8 child, they're taken to Illinois and put with a body of a mixed
9 group of kids, most of whom are older than them, up to age 15,
10 I don't know how you would not envision that there's that
11 possibility. That's part of the sheer terror.

12 THE COURT: Can we -- how do we --

13 MS. REDDY: That's created.

14 THE COURT: -- separate out, and I don't know that
15 there's an answer to this, so this is more of a rhetorical
16 question. It's got to be emotional distressful to leave your
17 home no matter how horrible it might be. To go the distance to
18 get to the border to cross that border with all the unknowns,
19 the dangers. When you talk about sexual abuse, you talk about
20 murder, aggravated assault, robberies all along the way being
21 with people you don't know, et cetera because you were
22 separated from your mother. I don't know where the mothers
23 were, but they were separated from the mothers.

24 And now you're across the border and you've got the
25 United States border patrol and official with the United

1 States. Wasn't that the first time they were ever safe was
2 when they were in the hands of the United States and under the
3 protection of the United States where shelter, food, I know the
4 beds look terrible, but they were beds. You're out of the
5 desert, there's -- I don't know if there's air conditioning, I
6 hope so. Isn't it now the first time you're finally safe?

7 MS. REDDY: I don't believe that the record of any of
8 these cases reflects that feeling of safety. I think that you
9 have a feeling of un --

10 THE COURT: And that's just a rhetorical question,
11 because I have no idea.

12 MS. REDDY: Right. No, well, you're watching other
13 people have their children taken away to unknown places, you
14 don't speak the language, you don't really -- you didn't expect
15 them to be just taken away with no explanation.

16 THE COURT: Right.

17 MS. REDDY: That's no -- nothing that your -- plus
18 under the law of torture you look at the vulnerabilities of
19 each person when analyzing whether -- whether you, you know,
20 this is -- this caused severe physical or mental stress. Those
21 vulnerabilities travel with that person, you know, along the
22 way and they come to the border and then you analyze what kind
23 of severe, you know, mental or physical dis -- you know, pain
24 or suffering you've caused; right?

25 But you have to take them as they come, their age,

1 their vulnerabilities, whether they've been persecuted all of
2 those things. I mean, not that the United States government is
3 responsible for any of that conduct. But that's how you look
4 at whether you've met this threshold that's showing of pain and
5 suffering, which I believe that we have easily met here. It
6 doesn't -- it doesn't have to be comparable. There are no --

7 THE COURT: I think --

8 MS. REDDY: Oh.

9 THE COURT: Would you look at this differently, and I
10 -- this is another rhetorical question because I know your
11 answer.

12 MS. REDDY: Right.

13 THE COURT: If the -- if there was a legitimate
14 governmental reason to separate them that was for the health,
15 safety and welfare of the father and the -- the child and it
16 was done in the right way, where they know, they're told why
17 this is being done, why they are being put in this facility,
18 the protections that are going to be in place. The food that's
19 going to be served, the translators that are going to be
20 available, what is going to be available et cetera, does the
21 whole equation change when the purpose of the separation is to
22 discourage the asylum application to cause -- the separation is
23 to cause pain as opposed to just the fact that the separation
24 occurred as part of this process?

25 MS. REDDY: Absolutely, Your Honor. I mean, it's a

1 factor. It's a factor in the analysis. The intentionality to
2 coerce someone else. I mean, that's what torture is, you know,
3 a mental torture especially. It's -- it's that intentionality
4 to -- and we don't have those facts here. I don't know, maybe
5 there would be some situation where that would be okay, but we
6 don't have those facts here. We have a complete lack of
7 information and a sinister plot, basically to say, okay, I'm
8 going to -- we're going to manipulate this statute and then
9 we're going to use this which hasn't been intended this way
10 previously, but we're going to use this -- this piece of the
11 statute to take away your children.

12 And then you're going to be in a position where
13 you're going to do almost anything to -- to get them back, even
14 if you have to go back to your country where you were
15 persecuted by gangs or, you know, subjected to death threats,
16 you know, in your own country that you're fleeing. I mean,
17 you're going to do almost anything. I mean, if you had to
18 weigh between, do I ever get to see my child and am I going to
19 go risk it, you know, with -- with the gang who is at my
20 mechanic shop, you might take that risk. You know, because
21 it's your child.

22 THE COURT: And I know we have subject matter experts
23 on immigration law and what's going on down at the southern
24 border. Do they -- are there facilities today, are there
25 facilities that accommodate single males, single females,

1 families, unaccompanied children? Like do they have separate
2 facilities and are they good? Or are they bad?

3 MS. REDDY: My understanding is that there are family
4 detention facilities just for this purpose to keep families
5 together because that was the policy and that's how it was done
6 previously. And that there are those family detention
7 facilities.

8 THE COURT: Okay.

9 MS. REDDY: Absolutely and no reason to separate
10 them, except for a -- a cruel intention.

11 THE COURT: Right.

12 MS. REDDY: To coerce them. You know, and to coerce
13 others, more importantly perhaps, they might hear of it through
14 the grapevine, don't come. Whatever the circumstances in your
15 country America is not going to even give you -- they are going
16 to take your child before you even get a right to say I have a
17 credible fear; right? So anyway, just this is a cumulative
18 analysis. You have a five- or seven-week separation. You have
19 parents waking up every morning not knowing if their child is
20 safe. You have the children waking up not knowing that they've
21 been abandoned by their parents.

22 THE COURT: And were there any like cell phones or
23 any way for the parent to communicate with the child?

24 MS. REDDY: I mean, I think that there were a few
25 phone calls often by, you know, people trying to contact their

1 children from the country of origin, trying to track them down,
2 manage to get through.

3 THE COURT: But we didn't provide cell phones? The
4 United States didn't provide --

5 MS. REDDY: I don't know. I don't think there were
6 any cell phones.

7 THE COURT: -- cell phones, or any other
8 communication?

9 MS. REDDY: I never, as far as my understanding, Your
10 Honor.

11 THE COURT: Or like liaisons that you could ask, well
12 that wouldn't be -- well, it would be better than nothing. But
13 --

14 MS. REDDY: My understanding was that the guards were
15 giving next to no information whatsoever, from our plaintiffs.
16 Now, I don't know if in other situations, but that's my
17 understanding. I understand that there were a few phone calls
18 arranged with one of the plaintiff's sons' mothers calling from
19 Brazil, who managed to track, track them down at one point.

20 THE COURT: And these facilities are they guarded or
21 do they just have -- I think they used the term correctional
22 care office -- down in Reading I know they had a unique term
23 they weren't guarded; people could walk out the facility, but
24 they stayed because they wanted to stay there. That was a
25 place they had shelter, they had food and they were being

1 protected until the next step whatever the next step might be.

2 Do you know, these facilities where these children
3 were held and where the parents were, are they like guarded
4 facilities with barbed wire and you can't leave them?

5 MS. REDDY: My understanding is that they were
6 detention centers where you could not leave.

7 THE COURT: Okay.

8 MS. REDDY: And at least in some of them there were
9 guards. And in some of the -- the children's the places that
10 some of the chil -- that the plaintiff, C.D.A., was taken was
11 not a place that he could leave.

12 THE COURT: Right. And just, you know, this is just
13 for my own edification.

14 MS. REDDY: Uh-huh. Sure.

15 THE COURT: I know this has nothing to do with the
16 motion because that's, my factual record there is nothing you
17 say now, it's based solely what's in the pleadings.

18 MS. REDDY: Well, thank you, Your Honor. So yeah, my
19 understanding just as far as my understanding is that they were
20 not permitted to leave. It was -- it wasn't a facility where
21 you were free to come and go, not that there would have been
22 any place for them to go.

23 THE COURT: Right.

24 MS. REDDY: However, my understanding was that they
25 were not free to go and including at Berks as well. So just

1 cumulatively you add that separation, you add the no
2 information given to either side, you add to that cumulatively
3 the threat of removal to the country of persecution, you don't
4 relinquish your rights, you add the intentional sleep
5 deprivation in the case of C.D.A. and Mr. A., you add the
6 icebox conditions and -- and -- and you cumulatively look at
7 all of those together and then you have to put this in the
8 context of family separation throughout history.

9 We saw a reference to World War II separations;
10 right? There's also a historical context to slavery, to
11 separations that occurred in this very country between children
12 and -- and parents. Now, you have to look in that historical
13 context that, you know, there's no reason for them to believe
14 that we're -- that the US is necessarily going to take good
15 care of their children.

16 THE COURT: Yeah, but you -- you have to be careful
17 there because you don't want to minimize what happened in the
18 concentration camps with the Nazis or minimize --

19 MS. REDDY: Of course not.

20 THE COURT: -- slavery.

21 MS. REDDY: No, I'm not --

22 THE COURT: This -- this certainly does not rise to
23 that level --

24 MS. REDDY: It -- it, yes.

25 THE COURT: But if you just --

1 MS. REDDY: Of course not.

2 THE COURT: -- say severe --

3 MS. REDDY: It's the panic.

4 THE COURT: -- suffering, severe mental suffering,
5 well, yeah. That sounds like severe mental suffering to me.

6 MS. REDDY: It's -- it's the panic of not knowing.
7 I'm certainly not saying anything like that would ever happen.

8 THE COURT: Right.

9 MS. REDDY: It -- it's the panic of not knowing and
10 not understanding the culture as well. You know? So -- so
11 just two more points on that. So the severity of this conduct
12 has also been considered by professionals, quite a few
13 professionals. And they agree that the parent/child
14 separation, the forcible parent/child separation constitutes
15 torture. They've looked at this very question. We cite to you
16 in our brief Physicians for Human Rights every case that they
17 evaluated rises to the level of torture. National Science
18 Council, separation creates toxic stress, it changes brain
19 architecture which is irreparable. And especially in young
20 children.

21 Consensus within the field of pediatric healthcare
22 and American Academy of Pediatrics consensus, filed letters,
23 they are submitted, attached and footnotes in our brief. And
24 then sleep deprivation is classic form of torture. So this --
25 these are cumulative things. Now, in addition with respect to

1 plaintiff C.D.A. the court in W.S.R. expressly found and I
2 quote, record evidence compiled in this case with regards to
3 C.D.A., demonstrate that suffering extreme irreparable harm to
4 their mental health, the fact of the matter is that W.S.R. the
5 other plaintiff and C.D.A. have proven that every day of
6 separation is causing dangerous harm to their mental health,
7 and that's at 1128 in the W.S.R. case.

8 THE COURT: Now, curiously, do you -- and it's very
9 difficult to conceptualize, but do you -- do you focus more on
10 the severe mental suffering of the child being separated from
11 its parent, his parent, or the severe mental suffering of the
12 father whose child's being removed from him?

13 MS. REDDY: I mean, I'm a parent, so --

14 THE COURT: Right.

15 MS. REDDY: I certainly -- I think they're different;
16 right? And -- and from this -- from the material that I've
17 read of -- of people, professionals who've studied this, what
18 it creates in parents especially it's -- it's -- and in
19 children, the PTSD of not being able to care for their child
20 which creates, you know, feelings of inadequacy and, you know,
21 but also physical sickness, anxiety, just unable to cope,
22 unable to eat, unable to just sheer, you know, mental break
23 down of, you know, I'm not able to take care of my child.

24 That, you know, that kind of anguish. And for
25 children, I mean you have all the cases that are kind of

1 heartbreaking with children being reunited not recognizing
2 their parent. That's obviously an anguish for the parent as
3 well. But I think for -- for young children, I mean, I also
4 have -- I have an eight-year-old and a nine-year-old. I mean,
5 the idea of my eight-year-old being alone in a facility with a
6 bunch of 15-year-olds, she would be terrified. So --

7 THE COURT: And I wonder, does it make it even more
8 challenging if it's a female versus male children?

9 MS. REDDY: Well, there is also the degrading element
10 of it because I know that even in the -- when brought up at the
11 border, and I don't know if it's carried on further, so I maybe
12 shouldn't speak to it, but you know, everyone has to use one
13 bathroom in a public area. And that's -- that's degrading for,
14 especially for adolescent girls. I mean, anyone really.

15 THE COURT: Right.

16 MS. REDDY: And I'm not -- I don't know what the
17 circumstances that's necessary or not, but it certainly seems
18 unnecessary to me. So other than the -- the professional
19 studies W.S.R.'s finding, all I'd say is that, you know,
20 defendant in countering this claim, they say all they did was
21 apply federal law and they've handled plaintiffs under federal
22 statutes. And they also claim that fathers were reunited with
23 their sons once the criminal case is concluded. I just want to
24 touch on that last one because it's wrong.

25 Plaintiffs allege weeks of separation after the

1 criminal cases were concluded and after Ms. L. was handed down
2 and the fact, you know, C.D.A. had to go to the Northern
3 District of Illinois to get reunited with his father. So that
4 was really simply not the case. And you know, defendant
5 couldn't have simply followed federal law because there is no
6 law that required that they separate children as young as four
7 months from their parents for months without any finding of --
8 of best interests or risk to the child or criminal history or
9 any of these things which are not present in this case.

10 So you know, just to -- last point on this one is
11 that, you know, there are horrendous cases. You know, torture
12 is horrendous, you're going to have horrendous facts. You can
13 look through all those cases and they're horrendous. I say
14 this is horrendous as well. I would also say that the question
15 isn't whether it resembles a case, you know, out of Guantanamo
16 Bay or something like that. The question is whether here we
17 plausibly alleged that defendants' acts caused severe mental
18 and physical pain and suffering and I -- and I would submit
19 that we clearly have met that -- that pleading burden.

20 THE COURT: Right.

21 MS. REDDY: With regards to torture.

22 THE COURT: Now, we use the -- one of the aggravating
23 factors for the death penalty in Pennsylvania is torture. So
24 if you've committed first degree murder and you tortured the
25 person before you -- you kill them, that idea of torture is

1 much different from this idea of torture. It's almost like the
2 word, there should be two words to mean the same thing but one
3 being that idea of applying physical pressure, burning them
4 with a flame thrower, whatever, causing that torture that leads
5 to death versus this torture, while temporary is severe, more
6 of a mental than a physical ram -- manifestation from it. But
7 it is -- that word torture is just hard because there's such an
8 array of what -- if you ask the layperson what is torture?

9 MS. REDDY: Right.

10 THE COURT: They can tell you what torture is. They
11 wouldn't think remove a parent from a child. But then if you
12 said if I removed your child from you would that be torture,
13 they would say yes.

14 MS. REDDY: Correct. Well, Your Honor, that was a
15 good lead in to my next crime. So cruel, inhuman or degrading
16 treat -- treatment is also recognized as a Juice Cogen norm and
17 we've pleaded that as well. Now, the crime has the same
18 elements of torture and you can see some of them here as
19 defined by the quality and human rights commission. Under the
20 case law it -- it's been described as torture, yet falling
21 short of torture. So it's as if defendant argues it doesn't
22 believe that plaintiffs suffered enough for it to constitute
23 what you might think of as the higher end of torture, which I
24 would submit is met by meeting the factors.

25 Here the question is whether defendant's conduct in

1 separating the children was universally condemned. Now, we
2 have a case, a unique case in certain ways where we have
3 universal condemnation of -- of this conduct, public record
4 shows that it was a national/international uproar over this
5 conduct we have it was condemned by the UN as unconscionable.
6 So here I think it easily meets -- meets that criteria and even
7 after they were ordered to reunify the family the public
8 documents show -- and these are also cited in the complaint and
9 in the briefing, the defendant made every effort to slow walk
10 these reunifications. To not comply with these orders.

11 To further coerce asylum seekers. That piece of
12 paper you saw with the removal options, which were no options
13 at all and were not justified under any legal construct was
14 given to plaintiffs after Ms. L. was already handed down. So
15 the government made, it treads all over these decisions in
16 upholding families rights, which is this document.

17 Now, turning to crimes against humanity, again the
18 same general ideas make up the prohibited act. What you also
19 need to have is a widespread attack against a civilian
20 population with knowledge. And here we alleged, plaintiffs
21 alleged that the zero-tolerance policy and the family
22 separation policy was implemented only on the southern border.
23 And against asylum seekers, the vast majority, over 98 percent
24 according to the government's own studies and documents were
25 from Honduras, Guatemala, El Salvador, or Mexico. Black

1 indigenous people of color and as is well known these countries
2 were disfavored under the former administration.

3 So I believe this is sufficient to allege crimes
4 against humanity at this stage of the litigation.

5 So to turn next to sovereign immunity. Unless you
6 have any questions about --?

7 THE COURT: Nope.

8 MS. REDDY: Okay.

9 THE COURT: You've explained it all.

10 MS. REDDY: I know it's well after --

11 THE COURT: Thank you.

12 MS. REDDY: Noon. So this argument was raised for
13 the first time on reply. So our position would be the court
14 need not consider it and then if it would -- if Your Honor
15 would like a full briefing, we would ask that you not make any
16 determinations to dismiss a claim on this basis without a full
17 briefing. However, I -- I -- I would -- I would like to talk
18 about --

19 THE COURT: Has there ever been a situation in the
20 history of this country where we've been sued and recognizing
21 this statute is not that old, but we've been sued under and
22 international statute of any sort whether it's the Geneva
23 Convention, whether it's this statute, whether it is any -- any
24 type of international statute because you know, the United
25 States jealously guards its jurisprudence and it is very

1 reluctant, often to a fault, from incorporating international
2 standards beyond what we individually determine to be the
3 appropriate international standard. We jealously guard that
4 and in fact, there's great criticism whenever we turn outside
5 of American juris prudence to get guidance from foreign
6 countries, statutes the UN et cetera, their great criticism
7 when we do that.

8 When this issue of sovereign immunity comes up the
9 first question asked, well, has the United States ever been
10 sued under a similar statute where it withstood attack? Would
11 this be the first time -- let's just focus on this time. Would
12 this be the first time that a lawsuit based on this act would
13 apply?

14 MS. REDDY: Let me just -- if -- if -- to answer your
15 question in a couple different ways.

16 THE COURT: Not that I mind being a, you know, on the
17 front line of things.

18 MS. REDDY: Absolutely, Your Honor.

19 THE COURT: But --

20 MS. REDDY: So Jus cogens violations, genocide,
21 murder, torture.

22 THE COURT: Right.

23 MS. REDDY: I mean, luckily you don't have cases very
24 often where the United States is -- is accused of -- of
25 genocide and torture. Now, you do have Jus cogens is -- is a

1 subset of norms that hierarchically -- and we'll talk about
2 this in a minute is about -- rises above customer international
3 norms. Anything created by the common law including immunity.
4 Those are created by the -- the federal common law.

5 THE COURT: Right.

6 MS. REDDY: Juice Cogen is here, down here is the
7 creation of those immunities.

8 THE COURT: If you've all been surprised to learn
9 that sovereign immunity is not in our constitution at all.

10 MS. REDDY: No. No. And there is actually a
11 petition which was originally against the Kang and you know, as
12 a way of getting -- but anyway, we won't talk about, we won't
13 talk about that full briefing I would be happy to go into that.
14 So what I would say for -- for their -- for Jus cogens norms,
15 we're not talking about general, you know, immunity from
16 anything other than this very specific and -- and
17 hierarchically supreme set of international norms.

18 And the question is whether there's domestic
19 sovereign immunity from that set of claims. And we would say
20 that federal common law says from the beginning it's never
21 recognized any immunity there. So you don't look for a waiver
22 where there's no immunity to begin with. And with regard to
23 those claims, you look to federal -- federal common law to
24 determine the substance of the rights, the remedies, the
25 liability for a violation of the Jus cogens norms. So I would

1 say there is a Shumari case in the Eastern District of Virginia
2 where Judge Brinkamen, I believe. Brinkema, has held that the
3 US does not have sovereign immunity for Jus cogens violations.
4 So on that note I would also I'll cite that to you, it's 368
5 SF.3rd 935, the Eastern District of Virginia.

6 Now, in terms of precedent in the Third Circuit I --
7 I believe there is none. There is no precedent directly on
8 point in the Third Circuit. So there's nothing that would --
9 that would control Your Honor's decision in that regard. And I
10 acknowledge that there are certainly cases out there regarding
11 express waiver. I completely understand that body of law. I'm
12 just saying it doesn't apply here, not in the Jus cogens
13 context.

14 So to develop that a little bit more, so as we talked
15 about Jus cogens it's a mandatory preemptory norm which
16 internationally -- and the international community recognizes
17 there's no derogation permitted bar none. And you know, just a
18 concept that kind of goes through this analysis is what was
19 recognized in Nuremberg that there are some acts that as a
20 matter of morality and reason are fundamentally wrong such that
21 no state may authorized their commission, nor immunize those
22 involved in such acts from liability. That's also in the
23 Shumari case that I had mentioned.

24 Now, the reason, first of all that you wouldn't look
25 to the ATS anyway for a waiver, not that there needs to be one,

1 and we'll talk about why there -- there would be no reason to
2 look for one. You don't need to get that far. Because the ATS
3 is a jurisdictional statute only. Okay? That has been held
4 numerous Supreme Court cases Sosa would be one of them. But
5 even prior to that, jurisdictional only, it doesn't confer any
6 substantive rights or duties or the rule of law and you have to
7 look to the federal common law for that.

8 Now, Sosa will tell us that when you look to the
9 federal common law, the federal common law incorporates
10 international law and therefore the United States recognized
11 international law as part of federal common law.

12 Now, our position as you know by now is that federal
13 common law does not recognize sovereign immunity for Jus cogens
14 violations. And there are three principles that, I think,
15 inform this analysis. There's a lot of context and history
16 which we, you know, we can -- we will submit in our briefing.
17 But the three principles, I think, are specifically kind of
18 informed as to why this result must be in my mind.

19 So first Jus cogens violations are not acts of a
20 sovereign. Okay? It's a non-derogable right not justified
21 under any circumstances. We have a -- a constitutional, we the
22 people, form of government. We chose that. We did not choose
23 a king, we chose to have a constitutional system of government
24 governed by the people, we -- we the people. So under this
25 system of government power is delegated by the people, and the

1 people can't delegate murder, torture, genocide to the federal
2 government. It's not a sovereign act it cannot be delegated to
3 the government. The government cannot act as a sovereign in
4 doing those -- in -- in performing those acts.

5 Now, this principle has been acknowledged in numerous
6 cases, Jus cogens violations are acts that are not authorized
7 by the sovereign. And here are a few of the cases that would
8 explain that. International law doesn't recognize an act that
9 violates the Jus cogens as a sovereign act. So right there
10 you're not acting as a sovereign, you shouldn't have sovereign
11 immunity. So we don't -- we won't leave it there, but that's
12 one concept.

13 So the government can't immunize itself for conduct
14 that goes outside of it's delegated authority. Any attempt of
15 its staff to bestow immunity on itself is an authorization of
16 torture, which is not a state act. So put another way, as in
17 Jesner, states don't have the sovereign right to violate human
18 rights.

19 The second principle is the principle of hierarchy
20 that we discussed before. Jus cogens trumps sovereign
21 immunity, just to put it simply. Jus cogens norms are supreme.
22 They have supremacy over all rules of international law. But
23 are in cases, is very constructive in that capacity. It was
24 dealing with foreign sovereign immunity, it's a different
25 issue. Jus cogens norms are above customary international law.

1 For customary international law everyone agrees this is the
2 law. But the states get to consent or not consent. And that's
3 very different than Jus cogens. Jus cogens are fundamental to
4 the international community and they transcend consent. You
5 can't say look, my state -- our interests differ so we're just
6 going to kind of bow out of this one. It's -- it's -- that's
7 not the way Jus cogens norms work. They are -- they transcend
8 consent. Consent is not required. There has to be a law that
9 everyone of the international members conforms to without
10 consent or there would be no international law of nations.

11 So you can see this in operation where Jus cogens
12 norms invalidate other rules of international law that conflict
13 with it, such as treaties. Treaties conflict with Jus cogens
14 treaty falls. So there can't be a non-viable, violable
15 international norm and at the same time a state's saying, yeah,
16 but we're immune. We have no extensive immunity.

17 I agree it's a contradiction and that contradiction
18 has to give way to the supremacy of Jus cogens. So countries
19 can't insulate themselves from Jus cogens, by a unilateral
20 decree. And the third principle, and there is a lot of context
21 that goes into all of these. I -- there -- I'm simplifying a
22 lot. Is it a right, must have a remedy. This is kind of core
23 to our very being. Margay vs. Madison the right of every --
24 every individual to claim the protection of the laws whenever
25 he perceives an injury.

1 Now, the blanket application of sovereign immunity
2 leaves injured plaintiffs without a remedy. Under the Westfall
3 Act a suit against the government, suits against the government
4 are the exclusive remedy for torts committed by government
5 officers in the course of government employment. The victims
6 may not sue their American torturers directly. The torture
7 victim protection act grants causative action only against
8 individual officials who commit torture under color of a
9 foreign state's law, unless answerable in a US court, federal
10 court these acts of torture committed at the border would be in
11 the unique position of being immunized everywhere in the world
12 by operation of foreign sovereign immunity and -- and -- and
13 company.

14 So there would be no remedy. Now, the Shumari case
15 holds that there is also an implied waiver. Our position, as
16 you know, is that the waiver's not required. You don't have to
17 get that far. But if you were, to get that far, the United
18 States has implicitly waived any sovereign immunity that
19 presumably it may have had, with regard to Jus cogens norms in
20 at least these following ways.

21 Now, so recognition of Jus cogens norms are essential
22 to the existence of this international community must be a law
23 that binds the member nations. The waiver comes by joining the
24 community of nations, accepting the laws of nations, holding
25 itself out as upholding the international legal order. By

1 ratifying the CAT. Under the CAT, or C-A-T, I'm not sure how
2 it's referred to, each state must ensure that victims are able
3 to obtain redress and they have unforcible rights to fair and
4 adequate compensation. And the US reports to the CAT committee
5 that it is in compliance with this and that it's keeping with
6 that mandate.

7 And then full circle coming back to the Nuremberg
8 trials, so the US participated in and developed the norms in
9 the Nur -- in the Nuremberg trials. It's actually, I think,
10 the principle author of -- of some of the principles that came
11 out Nuremberg at the end of World War II, which focused on
12 individual rights as well. And a quote, and this is also I
13 think quoted in the Shumari case, it's from the international
14 military tribunal of Nuremberg there's a principle of
15 international law, which under certain circumstances protects
16 the representatives of a state can't be applied to acts which
17 are condemned as criminal by international law.

18 The authors of these acts can't shelter themselves
19 behind their official position. So this -- these three areas
20 of -- they're also actually examples in the Shumari case of --
21 of different areas where the United States has implicitly
22 waived its immunity thereby applying equitable principles or
23 doing other things that kind of allow for it to be liable for
24 certain acts, which, you know, creates a kind of a grey area
25 that counteracts the notion that there has to be an express

1 waiver or -- that's the categorical. That's what everyone
2 wants you to do is to say, here's the line and if there's no
3 express waiver, it's done. But it's -- it's a lot more complex
4 than that and with regard to Jus Cogan if you were to review
5 and we would love to -- you know, brief this for you, the
6 history of the federal common law and how this develops over
7 the years and all of the acts that conform this understanding.
8 I don't think there's any other result, Your Honor.

9 And I -- I do -- I just with the cases that they've
10 cited they string cited cases in their brief on reply four of
11 those cases are not Jus Cogens claims, they have no relevance.
12 One was decided under the TV, the torture victim protection
13 act, it's not on point. I believe it's relatively -- victim
14 with regard to this case, I think the Jama case was decided
15 under treaties which were -- it's kind of a difference analysis
16 because you might expect that the treaty itself would have the
17 substantive con --- they are not self-executing, it was found
18 to not be self-executing.

19 You have here all of the substantive content of the
20 ATS claims is self-executing. That was found in Sepp's
21 (phonetic), so there doesn't need to be a statutory enactment
22 for a litigant to have a claim under the ATS. And the Ferets
23 case, to the extent it -- it -- it rejects the application of -
24 - or it requires a -- a waiver for a Jus cogens claim. It
25 relies on cases that are not Jus cogens at all to -- to -- it's

1 -- it's kind of black line rule. And it also doesn't analyze
2 any of the federal common law that informs this analysis of Jus
3 cogens, which I believe is necessary to come to a result as to
4 where, you know, whether or not the -- the US government has
5 foreign immunity for this, or genocide, torture and -- and
6 crimes against humanity.

7 THE COURT: And you believe that a private
8 individual, an individual standing alone, and I assume they can
9 be a citizen of the United States, a citizen of China, a
10 citizen of every -- any state, has a private cause of action
11 given jurisdiction by the -- the ATS to bring a lawsuit in
12 federal court seeking private damages, all relying on this Jus
13 cogens norms? Isn't this normally country to country when you
14 talk about Nuremberg that's not the rights of the -- of an
15 individual. Isn't this really country -- expectations of what
16 a country's laws will reflect as opposed to giving a private
17 right of action to an individual to sue a government?

18 MS. REDDY: Okay. I don't think that is such a far-
19 fetched idea to be honest because say Australia and New
20 Zealand, the United Kingdom, you know, they've -- they've --
21 they've all with regard to domestic acts by the US government
22 for which there is no other recompense, you're talking about a
23 very subset of norms that are highly selective. This doesn't
24 happen all the time.

25 THE COURT: Absolutely.

1 MS. REDDY: And thank God. You know, so I -- I don't
2 think that's -- I think that's the result of -- that -- that
3 really is -- is kind of directed by our -- our constitutional
4 form of government and by who we are as a -- as a nation that
5 we're not going to hold ourselves out of Nuremberg and create
6 all these standards we want every other country to comply with
7 and then say no, sorry, not us.

8 And -- and I -- I -- there are lots of limitations
9 that come through statutory, the foreign sovereign immunity's
10 act. And the TVPA has it's own limitations and gives it's own
11 grant. But for this particular circumstance which I don't
12 think is -- is opening a flood gate by any means, I -- I
13 believe that that we are properly here on an ATS claim and the
14 -- the government just can't claim sovereign immunity in this -
15 - in this circumstance, it's just -- it's not supported by --
16 by what was federal common law that informs the ATS claims.

17 THE COURT: Okay. Interesting.

18 MS. REDDY: Thank you, Your Honor.

19 THE COURT: Thank you very much, Counselor.

20 MR. EDLIN: Your Honor.

21 THE COURT: Yes, sir.

22 MR. EDLIN: That concludes our arguments, thank you
23 very much for your indulgence, it's much appreciated and if you
24 have any questions, we will seek to answer any, any questions
25 that you might have yet to ask.

1 THE COURT: No. But I -- so far these arguments have
2 been outstanding so we'll turn back to the government. Would
3 you like to respond? Or do you think you're ready for lunch?

4 MR. ST. JOSEPH: Okay. All right. Excuse me, thank
5 you, Your Honor. The government, at least for the federal tort
6 claims portion I won't be very long. I just have some -- a few
7 bullet points that I would like to hit if, the -- Your Honor's
8 agreeable.

9 THE COURT: Certainly.

10 MR. ST. JOSEPH: And -- and just the overriding theme
11 here is -- is what I want to hit and then just hit some -- some
12 specifics. Over and over again, plaintiffs go back to motives
13 and policies. And that's really the gravamen of the motion to
14 dismiss. This case is not supposed to be a systemic change --
15 systemic challenge, excuse me, we all agree to that. It's
16 whether individuals have a tort under the federal tort claims
17 act that can be pursued for com -- for compensation by the
18 individuals.

19 And it's clear based on the presentation and
20 arguments that there isn't an individualized claim. That --
21 that what happened was a -- it falls under the discretionary
22 function exemption of the federal tort claims act that it is
23 actually the definition of discretion. There was a policy, the
24 individual actors enacted that policy and -- and the key to
25 understanding that and recognizing that and again, let's take a

1 step back and say, we're not disagreeing that anything was
2 positive or good about that policy. I want to make that clear
3 on behalf of the government as it stands today that the policy
4 that was enacted in 2018 was renounced and the current
5 administration strongly continues to renounce it.

6 Having said that at its core for the individuals
7 coming forward with their claims the claim is that an
8 individual officer following that policy by the act of
9 separating a parent from child for the prosecution of the
10 parent, under criminal law, which is a valid criminal statute
11 pursuant to valid immigration statutes. It was cited earlier
12 1325, 1326. We don't need to get into the specifics now, it's
13 all in the -- the briefing. That act itself was the tort.
14 That that act itself was the thing that sets everything else in
15 motion. And that simply cannot be. There has to be something
16 more. And plaintiffs agree the something more is the policy.
17 It is -- is the animus of the then Attorney General over that
18 administration.

19 And while that may give rise to something, it does
20 not give rise to a claim under the federal tort claims act.
21 That for the reasons enunciated earlier that -- that particular
22 avenue is foreclosed. That there isn't a waiver -- that the --
23 that the exceptions apply and so therefore you can't -- you
24 can't proceed that. Just a few --

25 THE COURT: Go past that whole idea. Is it the

1 policy that's negligent? If the actor -- if the federal actor
2 is implementing the policy exactly as its intended to be
3 implemented and they, do it without any negligence, they're not
4 negligent, but the policy itself is causing harm, where does
5 the negligence come from? Is the actor then imbued with the
6 negligence of the policy? And can that -- can that lie in a
7 federal tort claims act?

8 MR. ST. JOSEPH: And -- and the answer is no because
9 essentially what you have there is a corporate negligence
10 theory and that's barred under the federal tort claims act.
11 That is not available. I believe that's the Rainer case that
12 made that clear. So, there's no corporate negligence. So once
13 you get to that level, and say that if the Attorney General who
14 lays out the policy is the one committing the negligent act,
15 then we don't have a claim under the federal tort claims act.

16 I don't mean to keep restating it, but there may be
17 something else out there, but it's not -- it's not this.

18 THE COURT: How about the anti-torture act?

19 MR. ST. JOSEPH: I wouldn't go that. I suggest
20 that's also, you're right but I'll leave that to Attorney
21 Finkelstein. You know, and -- and -- and part of the -- one of
22 the issues that was raised is the length of time between when
23 the prosecutions ended in each case, one with a conviction and
24 one with it being dropped and then the reunification. There
25 was a matter of time -- I think there's a factual dispute as to

1 Mr. Q. as to exactly how much time. But the -- but the
2 ultimate amount of time is not significant for the court's
3 current decision, because even that falls under discretionary
4 function. Now, we're talking about the actual implementation
5 of -- of the reunification of where people are being housed.

6 There's a reason Mr. A. and Ms. -- and C.D.A., his
7 son went to -- went to -- went to Berks County because
8 initially they weren't simply released and I guess there was
9 some belief that they might be more ready to be removed.
10 Whatever the basis of that was that's the process that has to
11 take place so that they can be reunited and -- and housed and
12 that's all pursuant to statute and -- and pursuant to -- to
13 what the government's supposed to do. That would arguably fall
14 under due care. It's the implementation of the subsequent
15 statutes when it comes to detention pursuant to removal.

16 One of the underlying claims about the children and
17 how they were housed. I -- I heard about, you know, we heard
18 about the ice box and different conditions of confinement,
19 which again, is not part of the case. And to the extent that
20 plaintiffs argue that transfer to HHS, once the initial
21 decision is made to -- to -- to go ahead and prosecute under
22 criminal statute, that's statutorily provided for and it's
23 provided for because it is again, in practice, what W.S.R.
24 found. The government doesn't dispute and didn't appeal that
25 -- that.

1 In practice it agrees it had a bad result. But the
2 actual statute itself is not unconstitutional and the
3 individual officer following the -- the provisions of that
4 statute is protected under either discretionary function on the
5 one side or due care, once the HHS portions come into effect.
6 So that also just circles back to where, Your Honor, this case
7 is troubling. We -- we acknowledge that. There's a lot of
8 push/pull in the way things should be applied.

9 But ultimately discretionary function and for the
10 reasons that were -- that I laid out, I don't want to go over
11 them all again, the case should be dismissed. Can we just see
12 if there's any -- I mentioned that.

13 Oh, I guess I'll wrap up with -- oh, I talked about
14 designation, once you're designated as a UAC, so the argument
15 is that that was a pretext rather than following from the
16 decision to prosecute. That's -- again, this isn't an avenue
17 to challenge how the United States implemented those things and
18 the reason I say that is first, the decision has to be made to
19 prosecute. Then the decision to designate as an unaccompanied
20 minor flow -- flows from that first decision. And so we go
21 back to, you know, what was the actual tort because once the
22 parent is designated for criminal prosecution the child then
23 naturally gets put -- or I shouldn't say naturally, pursuant to
24 the effort to accommodate and give the best possible care, gets
25 put into the UAC status.

1 So I will wrap up my portion by going back to
2 President Biden and the quote -- we saw a lot of quotes, but I
3 think we saw a movie clip in there during the middle of the
4 presentation. Putting that aside and just focusing on what the
5 current president has said, the court hit the nail on the head.
6 The president can say that someone may deserve compensation.
7 The appropriate means would be a congressional act, would be
8 going and assembling these cases and saying -- and
9 acknowledging as has happened with -- if we want to talk about
10 historical analogies, it happened 50 years later, but it
11 happened with --

12 THE COURT: Japanese internment.

13 MR. ST. JOSEPH: -- Japanese internment camps. You
14 know, and 50 years later Congress passed an act and -- and
15 provided some compensation. That would be the appropriate
16 means, not in a tort claim. And he certainly did not say I
17 think everyone should then turn around and sue the court. If
18 you remember, even the court itself says those who came
19 lawfully or unlawfully if X happened and even that it was an
20 awfully tough comment that a lar -- that basically encompassed
21 the whole recognition that he wanted to express on behalf of
22 the government as Ms. Finkelstein and I are doing today. That
23 -- that we're not making any pretense that -- that the events
24 that took place were -- we're --- we're not attempting to
25 defend those or suggest that those should come back.

1 We are attempting to in summary just state and -- and
2 hopefully get in Your Honor's agreement that the federal tort
3 claims act is not an appropriate means to remedy whatever wrong
4 ultimately may have happened. Thank you, Your Honor.

5 THE COURT: Thank you very much, sir. Attorney
6 Finkelstein?

7 MS. FINKELSTEIN: So let me ask you a question. How
8 interested are you in international law? Because if you are
9 very interested I will go slide by slide through Ms. Reddy's
10 slide show giving you my counter position. If you are not that
11 interested I will give you a more summary version of my
12 response to her.

13 THE COURT: Well --

14 MS. FINKELSTEIN: So I defer to the court as to what
15 you think is appropriate.

16 THE COURT: You're asking that question at the wrong
17 time of day. But I'm not that interested. I find it
18 interesting, of course, but I am always concerned about the --
19 the -- I use that term jealously guard, the American juris
20 prudence is different. And we are very reluctant to openly
21 admit that we're incorporating or adopting international
22 standards even though we have been the leaders in establishing
23 international standards, and establishing United Nations for
24 that matter, et cetera.

25 Obviously, we like to always do good. We like to

1 always be known as the country that stands for right and that
2 stands for morality and -- and we always want to be known as
3 good. And we go to great lengths to be known as good. And
4 that's why it's that kind of an incongruous that we are so
5 reluctant to openly admit that we're incorporating any
6 international standards into our juris prudence and it always
7 leads to great criticism. Because we like to be exceptional
8 and we like to stand out. And we don't -- we don't accept that
9 even though we often are like I said, the leaders in creating
10 it.

11 So I don't think it's necessary to go through there.
12 I think that whole issue is probably the most interesting of
13 this case. The federal tort claims act is more of a -- are we
14 trying to put a round peg in a square hole? Does it fit and --
15 and plaintiffs have done a great job of trying to maneuver to
16 get it to fit. Defendant's done a great job saying it just
17 doesn't quite fit and then its up to the court to determine one
18 way or the other, if it does fit or doesn't it fit, and is now
19 the right time to make that decision or should we allow more to
20 do all the factual record to work off of.

21 So while I appreciate the information, I'll decline -
22 -

23 MS. FINKELSTEIN: I'll give you the short version.

24 THE COURT: -- the invitation.

25 MS. FINKELSTEIN: Okay. Then I will give you the

1 short version. If Your Honor doesn't mind, I'll begin with the
2 venue question.

3 THE COURT: Certainly.

4 MS. FINKELSTEIN: And then I'll move to the ATS
5 question, the alien tort claim statute. So I think it was
6 really telling, the order in which plaintiff's counsel
7 addressed severance and transfer. That first they began with
8 severance and then with transfer. I think the reason why is
9 fairly obvious. There is very little commonality between these
10 two sets of plaintiffs that would suggest they should be
11 together in the case and Your Honor illustrated beautifully why
12 that's going to be problematic in this case. Not only
13 problematic at trial but problematic throughout the entire life
14 cycle of the case.

15 The official who separated Mr. A. from C.D.A. is in a
16 different state from the official who separated Mr. Q. from
17 E.A.Q.A. And the same flows with everything related to
18 discovery. All of the paperwork, all of the individuals, the
19 places where the depositions are going to happen. And Your
20 Honor also pointed out a really astute and important point
21 which is it's a federal tort claims act statute. So there's a
22 real slippery slope here. If these two plaintiffs, these two
23 sets of plaintiffs belong together in this case alleging torts,
24 ordinary torts under the federal tort claims act, not a
25 constitutional violation, not a challenge to the policy at

1 large, ordinary tort then what stops everyone from being
2 gathered together in these weird combinations in federal tort
3 claims act cases where I've got kind of a not sympathetic slip
4 and fall at the Post Office, well let me get some other people
5 who have more sympathetic slip and falls in some other state,
6 we'll put them all together. And that puts the government in a
7 really difficult position.

8 I have to fundamentally disagree with plaintiffs'
9 counsel's argument that the government is everywhere so it
10 doesn't make any difference. The federal tort claims act is a
11 very specific, narrow waiver of sovereign immunity. It gives
12 and it takes with the same hand. The decision is if you're
13 going to be able to sue the government you have to follow those
14 rules. Those rules include what types of claims you can bring.
15 Who can be part of those claims? Who you can sue. The fact
16 that you can't sue for corporate negligence or sort of global
17 mass tort. You can't sue for products liability. You can't
18 sue because you're complaining about back pains. All kinds of
19 little nuances.

20 And to just sort of waive them away because two sets
21 of plaintiffs want to be together because they now live in
22 Pennsylvania.

23 THE COURT: You just reminded me something that I
24 have to bring up, the idea in that diversity case, which we're
25 not dealing with here, but in a diversity, case joining

1 multiple different actions together to try to meet the amount
2 in controversial requirement, so you get ten different cases,
3 each one falling below the \$75,000 joining together, over the
4 \$75,000 and you have all those cases that arguably should not
5 be tried together but that's the only way they get jurisdiction
6 in federal court.

7 MS. FINKELSTEIN: And I would argue that Your Honor
8 will end up with a bunch of cases that don't really belong
9 together under the federal tort claims act that -- where you
10 have similar situations like this because these two plaintiffs
11 are certainly not the only two people -- these two sets of
12 plaintiffs are not the only four people who came across the
13 border and were subject to the policy. So if these two sets of
14 plaintiffs can be together in the Eastern District of
15 Pennsylvania because they live here now, who knows how many
16 other people could join together to this case or other cases.

17 It makes sense for them to be separate where there's
18 a true lack of commonality and here's there's a true lack of
19 commonality.

20 THE COURT: But -- but there is commonality with
21 respect to the law and I'm wondering has there been any effort
22 to form an MDL or anything along those lines?

23 MS. FINKELSTEIN: That was discussed. At this point,
24 the government is not suggesting that the cases should be MDL.

25 THE COURT: Because I think I heard 4,000 or

1 potentially 4,000 migrants that have been -- suffered through
2 this, which would seem that very likely there will be multiple
3 more, depending on how the law develops.

4 MS. FINKELSTEIN: There aren't as many cases as I
5 would have thought there were cases, Your Honor. When -- when
6 we first discussed our very first case --

7 THE COURT: Right.

8 MS. FINKELSTEIN: -- status conference I thought
9 there would be more than there were. But certainly, there are
10 thousands of people who could find themselves similarly
11 situated and join this lawsuit or join together in other
12 combinations any where across the country. And so there really
13 is no justification for them being together and I think that's
14 belied by the fact that plaintiffs counsel are now sort of
15 saying well, just punt it down the road, don't sever it now you
16 can sever it for trial. But all these factual distinctions are
17 going to be problems in discovery as well, as Your Honor,
18 recognized.

19 And that brings me to this question of transfer. So
20 once they're severed is there a reason for these cases to be
21 here? And we can go back and forth all day on the factors, the
22 private factors that the plaintiffs want to be here. I
23 recognize that. I think I've made it plain, the government
24 doesn't think that this is the best venue. We can go back and
25 forth all day long on those factors. They're not going to get

1 us anywhere.

2 We can go back and forth all day long on how many
3 depositions and do I have to identify the names of people. And
4 are some of them non-governmental employees anymore such that I
5 can no longer compel them to appear for a deposition in another
6 jurisdiction? All of that is possible. All of these factors
7 go back and forth. But there's one factor that's very clear
8 and Your Honor touched upon it, and that's public policy.
9 Because say what you will, this is a very unique thing that the
10 court is being asked to weigh upon. It is being asked to
11 interpret Texas, potentially Illinois, but at least at minimum
12 Texas, Pennsylvania and New Mexico law on a very novel set of
13 facts.

14 That would be, if -- if nothing else has convinced
15 Your Honor, the fact that we argued past lunch trying to
16 squeeze whether or not this fact pattern, this shifting of
17 sands in the plaintiffs' complaint, is it a challenge to the
18 policy? Is it not a challenge to the policy? Is it about
19 specific concrete tort? Is it about this, like, broad reason
20 why the government had an animus, but then resulted in harm on
21 people? We've got back and forth and to whether or not that
22 can squeeze into an intentional infliction of emotional
23 distress, loss of consortium.

24 We've gone back and forth on that for hours. It's
25 novel. And if a court is going to decide it, it should be a

1 court in Texas that can certify a question to the Texas Supreme
2 Court. A court in New Mexico that is familiar with New Mexico
3 law and the nuances. And the ways that their case law has
4 changed. And while of course we have full confidence in Your
5 Honor, the reality is that there is virtually no hook in
6 Pennsylvania.

7 The smallest hook for one set of plaintiffs is that
8 they were housed for a short period of time at the Berks
9 facility. Plaintiffs' counsel has -- has acknowledge just a
10 very small portion of the case. We believe the government has
11 an extremely strong argument for dismissal of that portion of
12 the claims, if not for everything else, which would make that
13 small hook go away. And now we have two sets of plaintiffs
14 that have no relationship to one another, never met each other.
15 Didn't come across the border in the same places at the same
16 time who want a court in Pennsylvania to decide on a very novel
17 set of facts that have wide reaching implications; right?
18 They're not the only ones who came through.

19 This -- that's precedent in -- under Texas law and
20 under New Mexico law and they're asking a Pennsylvania court to
21 determine that. We think that it is more appropriate for the
22 venue to be where the plaintiffs came across the border, where
23 they were subject to the policy. Where they were then
24 separated as a result of the criminal prosecution of the
25 parents and that everything else flows from there.

1 And so it's true that the venue is possible here, but
2 the government is requesting severance and transfer. We think
3 it's more -- more appropriate.

4 Okay. ATS. Our ATS. Let me take a step back here.
5 The plaintiffs are conflating the idea that there is a
6 violation of Jus cogens norms, with the question of whether or
7 not you can sue in federal court as an individual plaintiff for
8 an alleged tort that has happened to you under international
9 law. They are not the same thing. Jus cogens norms are a
10 certain body of norms that I do agree, in part, with plaintiff,
11 they are high level norms. I don't think plaintiff is quite
12 right that they sort of have this hierarchical trumping over
13 (indiscern.). But Jus cogens norms are universal preemptory
14 norms that -- those countries adhere to and they don't do it
15 just because they shook hands in a treaty. But they do it out
16 of a sense of obligation. That's -- that's Jus cogens.

17 It's widespread state practice and opinio juris, this
18 feeling of obligation. The fact that there is a Jus cogens
19 norm does not mean that there is a tort claim for an
20 individual. Jus -- a violation of Jus cogens norms as Your
21 Honor pointed out is litigated in the international court of
22 justice is a dispute between nations. So if another country
23 feels that the United States' policy of separation at the
24 border violates a Jus cogens norm, or quite frankly if a treaty
25 member of the CAT feels that the United States has violated the

1 CAT they can bring those claims in an international tribunal.

2 The United States is a party to the international
3 court of justice and can be sued there and consents to -- to
4 litigate international law violations there. So this question
5 of whether it's Jus cogens is just a question of whether it can
6 be a violation of international law. It doesn't answer the
7 question of whether these plaintiffs, these individual people
8 can come into a federal court and sue the United States under
9 the alien tort claims statute.

10 And I remind Your Honor that the United States
11 government didn't interject the Alien Tort Claims Statute into
12 this case. That's the law cited by the plaintiff in their
13 complaint. That's the law that they say entitles them to sue
14 for crimes against humanity, torture and degrading and inhumane
15 treatment. And so there needs to be -- in order for there to
16 be an ATS violation, an Alien Tort Claims Statute violation
17 there needs to be either a violation of a Jus cogens norm or a
18 violation of a treaty, which Your Honor sort of points out the
19 fact that you still have to comply with the ATS for a Jus
20 cogens norm considering that to sue under the ATS you have to
21 have one of two things, a Jus cogens violation or a violation
22 of a treaty and then you have to have a waiver of sovereign
23 immunity.

24 If you have that then you can come into any federal
25 court in the United States and you can sue under the alien tort

1 claims statute. What they don't have here is either. And
2 again, it's telling, the order in which these arguments were
3 made by the plaintiff. First, they begin with a violation of
4 whether or not there's a substantive violation and only then do
5 they circle back around to this jurisdictional question without
6 answering the question. The question is, can you sue in
7 federal court the United States government under the ATS? The
8 answer is no. Even if you have a jus cogens norm, you still
9 have to have a waiver of sovereign immunity. And the fact that
10 we've participated in Nuremberg, not individual plaintiffs
11 bringing a tort claim, that was a violation of the law of
12 nations not states litigating with each other is not a waiver
13 of sovereign immunity.

14 The fact that we have other disputes between nations
15 does not mean that there's a waiver of sovereign immunity for
16 individual plaintiffs. And the last thing I will leave you
17 with on the substance of the alien tort claims act is that it
18 is -- and Your Honor hit the nail on the head when you pointed
19 out that there -- one word, the word torture can mean different
20 things in different contexts. It's not enough to simply say
21 there's torture, there's a violation of the convention against
22 torture. There's a violation of the ITCPR, the international
23 covenant against civil political rights.

24 You have to prove that there's an actual violation
25 specific to what that treaty or what that Jus cogens norm

1 prohibits. So you can't just come in under the alien tort
2 claims statute and say something bad happened to me and its
3 torture. You have to actually prove that what happened here,
4 namely, a parent comes to the border without authorization,
5 crosses over the border, is apprehended with a child. There's
6 a decision made to prosecute the father for a violation of the
7 law. As a result of that prosecution the family is separated,
8 the parent is prosecuted and/or charges are dismissed. And
9 then after a period of time there's a reunification. You have
10 to find that that violates the CAT and that violates the ITCPR.
11 And that is a violation of jus cogens norm.

12 Not that torture at large is a violation or even that
13 you could sort of squeeze the effect of that action into the
14 CAT. If that was the test then the separations that we do
15 every day in the criminal justice system would violate the CAT.
16 If that was the test, if the test was the effects, whether or
17 not the effect of something has a negative effect that could
18 arguably be squeezed into one of these definitions then that
19 again would create a dangerous slippery slope or essentially a
20 variety of lawful actions under federal law, would then be held
21 to give a private cause of action that anybody who'd been
22 criminally prosecuted or anybody whose separated from their
23 child as a result of a criminal prosecution could bring a
24 claim.

25 At the end of the day, Your Honor, it's not an

1 appropriate vehicle to litigate what happened here under the
2 alien tort claims act. You heard Mr. St. Joseph say that and
3 you'll hear me say it again. That the government is not
4 minimizing or attempting to minimize what happened and we are
5 not defending the prior policy. But that isn't what this case
6 is about. This case is about whether or not the complaint as
7 pled states the federal tort claims act claim, and it doesn't.
8 Because it's an attempt to challenge the policy, not truly an
9 attempt to pled state law claims and whether or not the
10 complaint states a violation of the alien tort claims statute.
11 And again, Your Honor, it doesn't. It's an attempt to take a
12 negative outcome and construe that backwards as a violation of
13 international law and that simply is not what the alien tort
14 claims statute allows litigation over. And for those reasons
15 we'd ask that this court dismiss the complaint in its entirety.
16 In the alternative, if any claims survive, we ask that they be
17 severed and transferred as the government has requested. Thank
18 you.

19 THE COURT: Thank you very much, Counsel. Mr. Edlin?

20 MR. EDLIN: Thank you, Your Honor. I think I can
21 handle most of this, just so save a little bit of time. And
22 I'd ask Ms. Reddy to address anything on the ATS. Your Honor,
23 I'm not usually a big one for commenting on the other side's
24 order of arguments. I don't think it reveals too much, but if
25 anything reveals anything the ATS, the sovereign immunity

1 claims was only raised by the government in its reply. And if
2 the government acknowledges the ATS is present in the
3 complaint. So they should have raised it right away.

4 Now, I'm not suggesting that that minimizes what the
5 court should do with the issue, it was only raised on reply.
6 We've spent a great deal of time talking about it. It is a
7 complicated issue, far more complicated than the back of the
8 hand that counsel gives it. And if Your Honor is going to act
9 on that in any way other than to allow the complaint to go
10 forward you can -- the appropriate thing to do is to allow both
11 sides a briefing.

12 So a couple of intermittent items. With respect to
13 the Biden quote, which -- which counsel raised. This is the
14 president. The president is not saying, as by the way, the
15 government is saying with respect to the Roe v. Wade law, hey,
16 we better pass some new laws to deal with that. That's not
17 what the president said. The president didn't say, gee what
18 happened at the border was terrible we really should pass some
19 laws for you. The president said you are entitled to recover
20 for what happened to you.

21 We have plenty of laws that protect our clients.
22 We've pled them. The president does not say we don't have a
23 remedy for you. The president was saying you're entitled to a
24 remedy.

25 THE COURT: And I assume as patient as you are,

1 you're not patient enough to wait 50 years for Congress to pass
2 a law and the president to sign it?

3 MR. EDLIN: Yes, Your Honor. You know, I used to
4 represent Ross Perot when he ran for the presidency. He said
5 something I thought that was very true. He said, we take in
6 plenty of money in taxes, we just need to spend it better and
7 we have plenty of laws to cover all kinds of things, we just
8 need to apply them better. With respect to the latter comment
9 I believe that's correct. We have pled sufficiently here under
10 the laws as they exist. And the president indirectly,
11 counsel's boss, has said that a remedy should be afforded to
12 our counterpart. And we agree with the government's position
13 there.

14 With respect to transfer and severance, again,
15 counsel misstates the law and the factors here. They said the
16 big issue is whether or not this court is going to be able to
17 decide a hard question of Texas law. That is not the most
18 important factor. The most important factor is the plaintiffs'
19 choice of forum and that is heightened when they reside in the
20 forum as they do here. Now, if I were the government, I would
21 like to pick these two in -- Your Honor, I'm sure it's no
22 secret that we're doing this case pro bono. They don't have
23 the funds to afford to fight the government here. This is a
24 very aggressive government defense here.

25 They can say that they are not defending this policy,

1 but they want to do is deprive our clients from any right to
2 pursue a remedy as a result of that policy. This is -- this is
3 a theoretical distinction. They are trying to deprive our
4 clients a recompense for what happened at the border and -- and
5 having done that, which they say, gee that was terrible, but
6 don't blame us for it. Now, they want to separate them and
7 send them back to New Mexico and back to Texas where they've
8 previously been traumatized. And they want to send them back
9 there individually. Now, we will go, we'll take depositions
10 all over the place, we don't care, it doesn't make any
11 difference to us.

12 That's not the point. The point is these individuals
13 have to travel and go to those places themselves. And they
14 don't have the funds for that. And there's no reason to force
15 them to go back to these places when they have chosen
16 jurisdiction where they reside and where it is equally
17 convenient for the government to litigate.

18 Now, the factor that we've been discussing about this
19 court's ability to decide the law of Texas. That is not a
20 prevailing factor. That is not the number one factors; it is a
21 factor. Your Honor, I have been in -- I have absolutely no
22 doubt that Your Honor's going to be able to parse issues of
23 Texas and New Mexico tort law if required. But the
24 Pennsylvania choice of law provisions say that if the laws of
25 those states are similar to Pennsylvania the court will apply

1 Pennsylvania law. And I'm very sure that the court can apply
2 Pennsylvania law.

3 But it doesn't matter, the court is capable of
4 applying any of these laws to this fact pattern as Your Honor
5 has said, many of these facts are not in dispute. But that is
6 not a primary factor. It is a factor. The law identifies
7 primary factors and they are no basis to transfer this case.
8 Counsel also said with respect to the ATS claims, well, you
9 know, what we would have to do is prove all of these things and
10 there's a litany of things that -- that Counsel said. I don't
11 know how much of the specifics of that I agree with. But
12 generally speaking, we're not here to prove anything to them.
13 We are here to plead and our pleading doesn't require us to
14 prove a single thing.

15 We've established a right to proceed. We will have
16 days that we need to prove things, that is not this day. Anne,
17 anything on the ATS claim other than (indiscern.)?

18 MS. REDDY: I just wanted to -- to add, Your Honor,
19 to as to private individuals, is the alien tort statute would
20 also limit that to aliens, so I don't think I mentioned that
21 before, but that would be a limitation. And just to touch on
22 what -- what my -- Mr. Edlin had said, we went through the
23 elements. The elements are set forth in the CAT. There isn't
24 any kind of requirement that they have to be similar to other
25 cases where torture is completed. We went through -- got to

1 meet each of these elements at the pleading stage in -- in
2 sufficient detail. We haven't just -- it's not me up here
3 saying, hey this is torture because I say it's so. We've gone
4 through why this meets the elements of torture and why it meets
5 the elements of these other crimes. So, I would submit that
6 that's sufficient on the pleadings stage. And that is fully
7 briefed in our papers. Thank you, Your Honor.

8 THE COURT: Thank you very much, Counselor.

9 MS. REDDY: And we would like to brief the sovereign
10 immunity. Thank you.

11 THE COURT: Just -- certainly.

12 MR. EDLIN: Having said that, Your Honor, I think
13 since we've all had our say I'd like to just thank you very
14 much for your time and your attention and your indulgence of
15 our extensive arguments here. Thank you so much.

16 THE COURT: Certainly. I want to thank all of you.
17 I assume nobody has anything else.

18 MS. FINKELSTEIN: We also want to thank Your Honor.

19 MR. ST. JOSEPH: Thank you, Your Honor.

20 THE COURT: I do want to thank, well, of course. I
21 do want to thank all of you for the outstanding presentation
22 here. Your written submissions were outstanding, but this
23 added a lot to those written submissions, so I very much
24 appreciate you putting the time and the effort into being here
25 today and presenting this. I will take this under advisement.

1 I'll review it all again. If you need any advice where you can
2 get some lunch, et cetera, just see my deputy here, Deputy
3 Fitzko. But everyone have a great rest of the day and I thank
4 you very much. Take care.

5 MR. EDLIN: Thank you, Your Honor.

6 MR. ST. JOSEPH: Thank you, Your Honor.

7 MS. FINKELSTEIN: Thank you, Your Honor.

8 THE CLERK: All rise.

9 (Court adjourned)

10

11 C E R T I F I C A T E

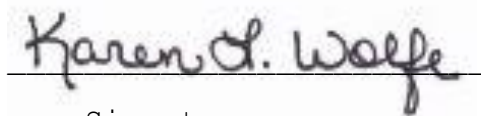
12

13 "I, Karen Wolfe, certify that the foregoing is a correct
14 transcript from the official electronic sound recording of the
15 proceedings in the above-entitled matter."

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Signature

7-20-22

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Date